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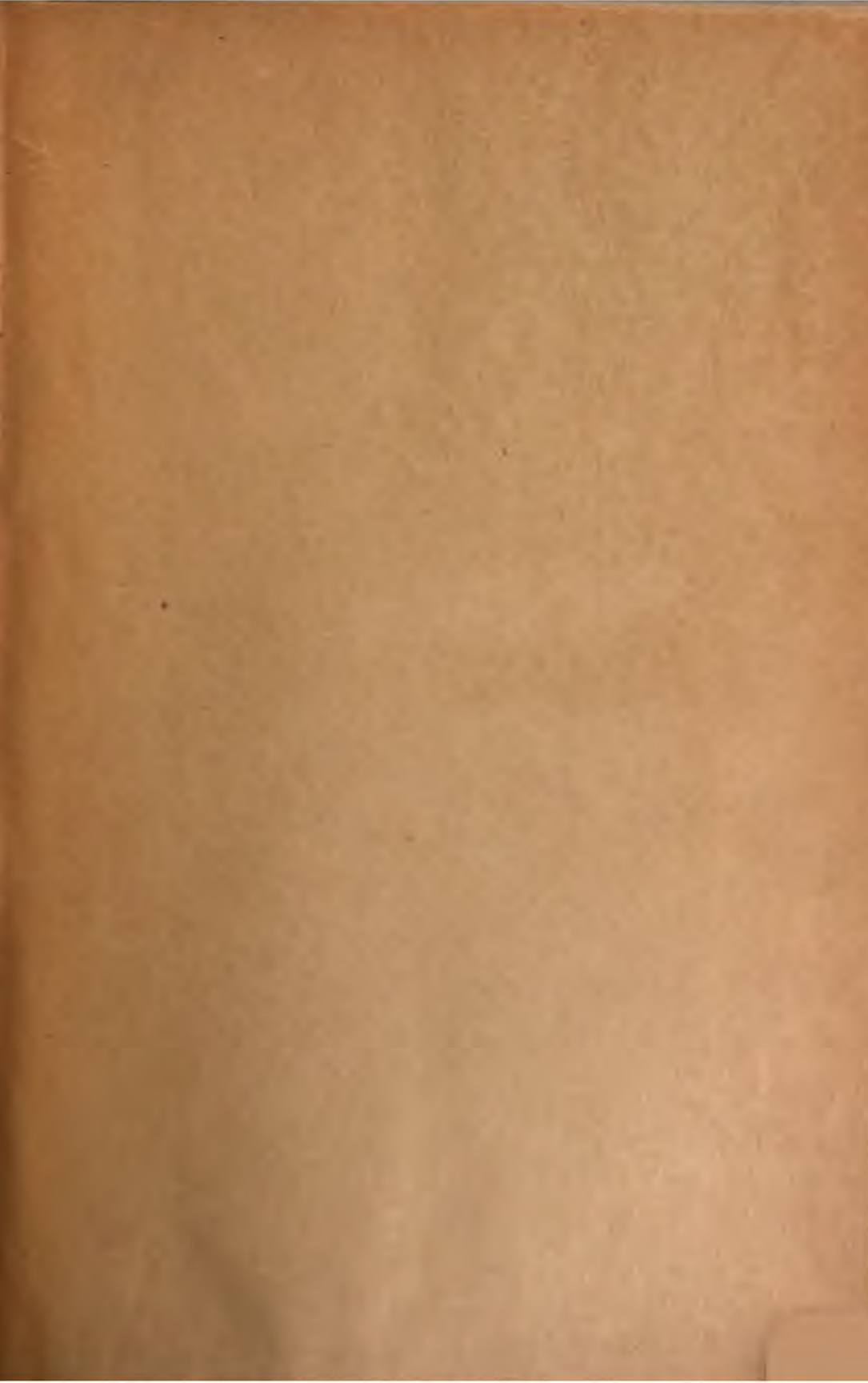
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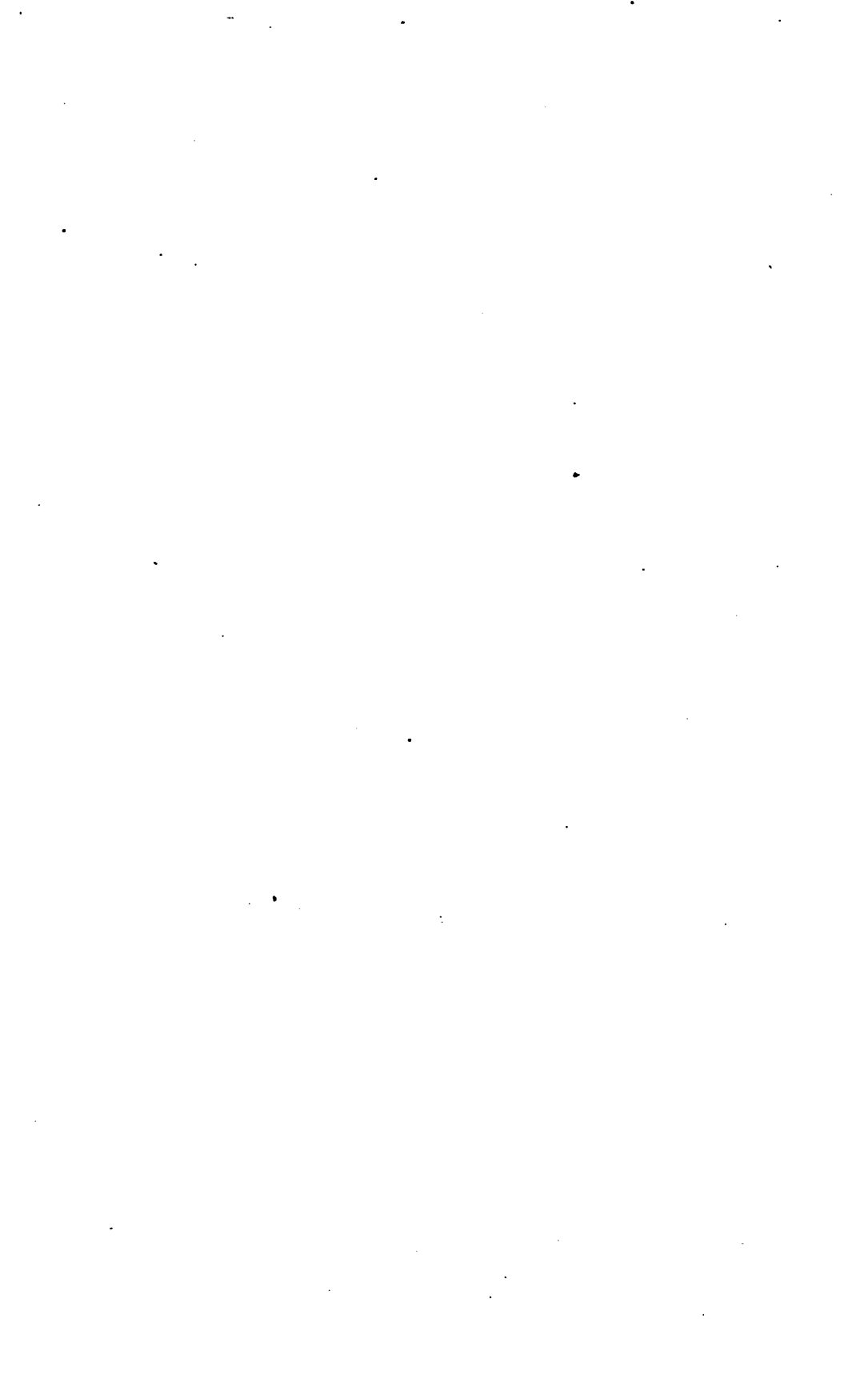


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THE LAW MAGAZINE AND REVIEW.

No. CCLXXXII.—NOVEMBER, 1891.

I.—THE REFORM OF THE MARRIAGE LAWS OF GREAT BRITAIN AND IRELAND.

Subject Defined.

RECENT events, such as the decisions in the cases of *Reg. v. Jackson*, reported L.R. [1891] 1 Q.B. 671, and *Beauclerk v. Beauclerk*, reported in the *Law Reports* [1891] P. 189, have lately drawn special attention to our laws as to the persistent desertion of a wife from her husband, and as to the adultery of a husband who had lived apart from his wife for twenty years, and who was charged with frequent acts of adultery during that period. As the Law of England, in my opinion, affords inadequate remedies in these and cognate subjects, I here propose to give a *résumé* of the reports of those cases, and to make some observations upon the decisions themselves, and to offer suggestions in regard to the reforms which are desirable, or imperatively required, in our laws as to desertion, divorce, and kindred subjects. But I have to observe that I shall, in this article, chiefly confine myself to the consideration of the status of married persons in England.

Reg. v. Jackson.

In this case, on the 15th of March, 1891, an *ex parte* application, on behalf of Emily Jackson, was made to a Queen's Bench Divisional Court of the High Court of

Justice, before Mr. Justice Cave and Mr. Justice Jeune, for a writ of *Habeas Corpus* to be directed to her husband to bring her before the Court in order to restore her to liberty. From the affidavits produced in support of the application, it appeared that Mrs. Jackson, who was 46 years of age, had, on the 5th of November, 1887, married, at Blackburn, Edmund Haughton Jackson; and that the marriage had taken place without the knowledge of any of her family. It further appeared that, on the following day, Mr. Jackson went to London, and four days afterwards sailed for New Zealand. During his absence abroad, Mrs. Jackson corresponded with him; but, before he returned to this country, she wrote to him that she would not live with him. In July, 1888, the husband returned to England, and Mrs. Jackson persistently refused to have anything to do with him. He, however, commenced legal proceedings for the restitution of conjugal rights, and, on the 30th of July, 1889, obtained decree in his favour. Mrs. Jackson refused, and still refuses to obey this decree. On Sunday, the 8th of March, 1891, she was forcibly seized at the door of the church at Clitheroe, and carried away by Mr. Jackson to Blackburn, and had been detained there up till the application for the said writ. The evidence also proved that Mrs. Jackson was forcibly detained against her will, by her husband, Mr. Jackson; and that all access to her by her relations, or by her medical and legal advisers was prevented by her husband. There was no evidence given, on the application for the writ, of any violence or ill usage since the date of her capture. Several statutes and cases were cited at the Bar, and in the Judgment of the learned Judge, Mr. Justice Cave, who delivered the leading Judgment. They were the following: The original *Habeas Corpus* Act of Charles II., and the Act of 56 George III., c. 98, "for more effectively securing the liberty of the subject," were cited. The case of the Countess Ferrers,

decided in 1757, and before the Act of 56 George III., was also cited from 1 Burrow's Reports, in which case Lord Mansfield said that the writ of *Habeas Corpus* was granted "as the circumstances of the case, where delay may be dangerous, required it. It is reasonable that the lady should have the opportunity of laying her case before the Court, and swearing the peace if she think proper." The Act to amend the Matrimonial Causes Act, 1884, 47 & 48 Victoria, c. 68, was also cited. It enacts, in section 2, "that a decree for restitution of conjugal rights shall not be enforced by attachment," *i.e.*, by arrest and imprisonment for disobedience to the decree. *Reg. v. Lister*, reported in 1 Strange's Reports, and *Reg. v. Mear*, reported in 1 Burrow's Reports, p. 542, were also cited. In the latter case, where articles of separation had been executed, the Court refused to compel a wife to return to her husband, and Lord Mansfield put the decision of the Court on the ground of a voluntary renunciation by the husband of his marital rights. But, as a general rule, "the husband," his Lordship said, "has, in consequence of his marriage, a right to the custody of his wife, and whoever detains her from him violates that right, and he has a right to seize her wherever he can find her." In the former case, where a wanton or excessive exercise of the marital right was attempted to be enforced by the husband, the lady was discharged. Here Mr. Justice Coleridge laid down that "where the wife will make an undue use of her liberty by going into loose company, &c., it is lawful for the husband, in order to preserve her honour and state, to lay such a wife under restraint. But where nothing of that appears, he cannot justify the depriving her of her liberty." The case of *Mrs. Cochrane*, decided in 1840, reported in 8 Dowling, was also cited. In this case, Mr. Justice Coleridge laid down the law in general terms in these words: "There can be no doubt of the general dominion

which the law of England attributes to the husband over the wife." He then went on to say: "On the other hand, there are numerous authorities to shew that the Courts will interpose their protection whenever the husband attempts to abuse the marital power for any improper purpose, or by any wanton or excessive exercise of it." Strange to say, the Divisional Court in Jackson's case seems to have been of opinion that, in Mrs. Cochrane's case, the writ of *Habeas Corpus* was refused, while the fact is that the writ was actually issued. On the return to the writ, the husband was held to be entitled to the custody of his wife. In delivering judgment in Jackson's case, the Master of the Rolls said that "in Cochrane's case the judgment was extremely vague and obscure, and the decision was absolutely wrong, and must be deemed to be overruled." At the same time, Lord Justice Fry said: "In Cochrane's case, the husband got possession of his wife by stratagem, and the case was not satisfactory." These quotations and observations must suffice as to the cases cited in Jackson's case.

In delivering his judgment in Jackson's case, Mr. Justice Cave said that "The words cited from the case of *Reg. v. Lister* must be understood with reference to the case before the Court, in which violence and imprisonment had been made use of for an unlawful purpose; and, so holding the case not to be within any exception, I refuse the writ. Now, that being the law, and the husband having a right to the custody of his wife, unless he uses it for some improper purpose, or is guilty of some excess or misconduct, what are the facts in the present case?" His Lordship then stated the facts, and laid great stress on the Decree of Conjugal Rights obtained by Mr. Jackson, as proving a just claim to the custody of his wife; and also on the acts of Mrs. Jackson's relations, as shewing that their influence had been used with Mrs. Jackson against a reconciliation with her husband. His Lordship held that it had not been

shewn that the husband had done anything to disentitle him to the custody of his wife. "If," his Lordship went on to say, "there were a *primâ facie* case of cruelty, that would certainly entitle her to apply for the writ. But I can see no trace of anything of the kind." He also said: "It would be of no use to grant a rule *nisi*, when it appears clear that it must be discharged. I think, therefore, that the application must be refused." Then Mr. Justice Jeune said that he was of the same opinion, and also that "though generally the forcible detention of a subject by another is *primâ facie* illegal, yet, where the relation is that of husband and wife, the detention is not illegal." The application was accordingly refused by the Divisional Court.

On the following day, in the 1st division of the Court of Appeal, before the Lord Chancellor, the Master of the Rolls, and Lord Justice Fry, an application was made for a *Habeas Corpus* by way of an original motion, and also by way of Appeal. This Court ordered a writ of *Habeas Corpus ad subjiciendum* to be issued, and to be served on Mr. Jackson, who was required to produce his wife in Court on the 19th of March, and to state the cause of her detention, in order that the Court might judge and determine whether it was sufficient in law; and, if not, that the lady, in due course of law, might be discharged. This application to the Court of Appeal was made on the facts laid before the Judges of the Divisional Court.

On this occasion, the old cases were almost laughed out of Court, and no great reverence was paid to decisions which were cited in support of the proposition that a husband could beat his wife as well as restrain her in her liberty. After the Act of 1884, section 2 (*Ante*), the right to imprison a husband or wife for simple desertion was out of the question. No doubt, Blackstone writes, that "From their warm

attachment to the Common Law of the realm, the common people are much addicted to the exercise of their ancient privilege." But, in the case of the *Queen v. Leggatt*, 18 Q.B. Reports, p. 780, decided by the full Court, of which Mr. Justice Coleridge was a member, the old English Common Law as to a husband having a right to beat or restrain his wife—if it ever existed at all—was overturned, and set aside. In that case, Lord Campbell, C.J., said: "If the wife were before us, we could not compel her to go to her husband, as the Affidavits shew that she desires to live with her son." His Lordship went on to say: "At Common Law, the husband has no right to the custody of his wife."

The learned counsel who argued for the issue of a writ of *Habeas Corpus* by the Court of Appeal, grounded his application so far as the jurisdiction of the Court was concerned—(1.) On the 19th section of the Judicature Act (1873), that the Court of Appeal had jurisdiction on any Appeal from "any Judgment or order;" and (2) on the 5th section of the Judicature Act, giving to the members of the Appeal Court full power to sit as ordinary Judges. Under the practice before the Judicature Act, an application could be made to anyone of the Common Law Courts, after it had been refused by the other Common Law Courts. But no decision was cited to shew that the Judges of the Court of Appeal, as ordinary Judges of the Supreme Court, ever issued a writ of *Habeas Corpus*. Under the old practice of the Court, before the Judicature Act of 1873, there was no Appeal on an application for a writ of *Habeas Corpus*. The Court of Appeal reserved the question of jurisdiction, till it could be argued on both sides.

On the return to the writ, Mr. Jackson, the defendant, justified what he had done in the seizure, treatment, and detention of his wife, by the legal rights of a husband according to the Law of England. But the question of

the jurisdiction was not argued by the learned counsel for the defendant. It was, in fact, abandoned, in consequence of observations made by the Court, at the very beginning of the argument. For example, the Lord Chancellor said that he had undoubted jurisdiction in this case by way of Appeal on a motion for *Habeas Corpus*; and that, if the facts disclosed a case for intervention, the Court, or he himself, would order a writ to be issued. The Master of the Rolls also said that the Court of Appeal held, in the Bell Cox case, that the Court of Appeal had jurisdiction in cases of *Habeas Corpus*; and that the House of Lords had affirmed their Appellate jurisdiction on that point. Thereupon, Counsel for the Appellant said that he would not trouble the Court with any arguments against the jurisdiction of the Court of Appeal in this case.

The return to the writ was then called for, and was read by the Master of the Crown Office. It contained a statement of the facts already given, and pleaded justification by the Laws of England.

During the argument, the Lord Chancellor said that, in this case, "the circumstances under which the wife was seized and detained are not such as to negative undue violence and severity." Lord Esher, M.R., also said, that a husband never could, by the Common Law of England, beat his wife. But the authorities are, I submit, against this view. Moreover, there is no inherent improbability that the ancient authorities are a true exposition of the ancient Common Law of England, down, at all events, to the reign of Charles II. Lord Esher asked the learned counsel for the defendant to distinguish between confinement and imprisonment; but got no satisfactory answer. In Cochrane's case, Mr. Justice Coleridge did not shrink from the logical consequence of his opinion as to the husband's right to control his wife, as perhaps involving perpetual imprisonment. He defended his position by

saying that cases of extreme hardship might occur under it. But Lord Esher said the Act of 1884 was now conclusive that the husband had no power to compel his wife to reside with him, "or the Act was a farce." The learned counsel for the appellant argued that the old law as to Matrimonial adherence was barbarous, obsolete, and repealed.

The defendant further stated that, since the date of his wife's detention, on the 8th of March last, he had used no more force or constraint than was necessary to take her, or to prevent her from returning to her relatives. But, according to the evidence of Mrs. Baldwin, a married sister of Mrs. Jackson, considerable violence was used in Mrs. Jackson's seizure, and the capture was made in opposition to the utmost efforts of Mrs. Jackson and Mrs. Baldwin, and against the express and re-iterated wishes of Mrs. Jackson herself. The defendant admitted that he guarded the house, where his wife was detained, against a forcible entry and re-capture. Practically, the material facts in the case were undenied, and the Lord Chancellor pointed out that the statements in the evidence for Mrs. Jackson were uncontradicted in any important particular. After the case was fully and ably argued on both sides, the Judges of the Court of Appeal decided against the sufficiency of the return to the writ. However, before they arrived at this decision, they had a conference, in their private room, with Mrs. Jackson, to ascertain how far external influence had been brought to bear on her, and to satisfy themselves that she was a free agent. When their Lordships returned into Court, they proceeded to give judgment that the lady should be set at liberty.

In his judgment, the Lord Chancellor said: "The Court has satisfied itself, by hearing what Mrs. Jackson has had to say, that, in refusing to go to her husband's house, and in resistance to her continuance therein, she was acting

entirely of her own will, and has not been forced, nor, indeed, as far as present circumstances are concerned, induced by any one else to refuse to continue in her husband's house, and was not compelled to remain where she was before he removed her." He also said: "It appears to me that the authorities for the right now claimed are every one of them grounded on the notion of the absolute dominion of the husband over the wife, which lies at the foundation of the arguments here for the right to detain this lady. The question of law has never been raised in an abstract form, unaccompanied by circumstances by which a qualification might be introduced into the abstract proposition laid down." His Lordship further said that, in the present case, there was no reasonable ground for physical restraint whatever, and that, whatever might be the exact distinction between confinement and imprisonment, he was prepared to hold that there was imprisonment here. He also held, in point of fact, that the return of the defendant to the writ was bad in law, and could not be supported after the passing of the Matrimonial Causes Act of 1884. He further said that, he was of opinion that a husband had no legal right, by himself, of his own notion, to seize and imprison his wife until she consented to the restitution of conjugal rights; and that "no such right ever did exist in our law. Whatever authorities may be quoted for any such proposition, it has always been subject to this condition, that, where she has a complaint of, or is apprehensive of, ill usage, the Court will never interfere to compel her to return to her husband's custody." He further said: "I am prepared to say that no English subject has a right to imprison another English subject (who is *sui juris*, and entitled to a judgment of his or her own) without any lawful authority; but, if there were any qualification of that proposition, I should be of opinion that the facts of this case would afford an ample justifica-

tion to any Court for refusing to allow the husband, in this case, to retain the custody of his wife." His Lordship also said: "I confess I receive, with indignation, the statement of the facts in this case"—as regards Mrs. Jackson's capture, treatment, and retention—"and the utter absence of any apparent sense of delicacy or the respect due to the wife, whom the husband has sworn to love and cherish and protect." In conclusion, he said: "The result is that there is no power, by law, such as the husband professed to exercise, and the facts, to my mind, afford sufficient reason to the lady to apprehend violence in future, considering the circumstances of her seizure. On either of those grounds, it would be enough to say that the return to the writ is, in my judgment, bad, and that the lady be restored to her liberty, and allowed to choose her own place of residence, wherever she pleases."

Lord Esher agreed with the Lord Chancellor, and said: "The Court have to consider whether the husband had a right to take away the lady's liberty. The husband justified his doing so, on the ground that he had a right to take possession of his wife by force, and keep her in confinement, to prevent her from leaving him. If this was law, then, an English wife was the mere slave of her husband—an abject slave of his will, a mere chattel, with which he may do as he pleases. But that was not the Law of England, and never had been; and, though, in some cases, there might be the power of temporary restraint, there was no such power of imprisonment." "But," said his Lordship, "even if the absolute right contended for really existed, the facts disclosed in this case, in the seizure, treatment, and detention, were such as shewed that the defendant was not entitled to the custody of his wife, and that the lady should be set at liberty by the Court." He said that the seizure and confinement were grossly insulting to the lady, and as between husband and

wife, the seizure was brutal. "The defendant had, it is true," said his Lordship, "a decree for restitution of conjugal rights; but he had no right to take the law into his own hands, and execute it in this way. The Court itself could not now imprison her; the power has been taken away; and he had no right to do, in his own way, what the Court could not have done. The Court will not, therefore, give her back to him, and I agree that she must be set at liberty." Lord Justice Fry also agreed, and said that the question of law was raised on the return, "whether a husband had a right to capture and confine his wife until she rendered him conjugal rights. As to the right to capture her, there was not a ray of authority for it, and no authority had been produced for it." He also said: "So, as to the right to confine the wife indefinitely at the will of her husband, there was no authority for it. Then, the Act of 1884, which took away the power of imprisonment from the Court, tended strongly to shew that the husband had no such power. I concur, therefore, in the judgment." Thereafter, the Lord Chancellor added: "As there has now been an authoritative declaration of the law against the supposed power of the husband, any attempt to exercise it will be a serious contempt of Court."

Remarks on Jackson's Case.

From the preceding report, the reader will easily perceive (1) that, in England, a man and a woman may be married, and yet live apart from each other, as if they were absolute strangers; and (2) that the Law of England has provided no means to compel them to adhere in accordance with their marriage vows, or to enable them to get rid of their obligation to live with each other till death part them. The decision in Jackson's case clearly shews that, in the Law of England, there is no process to enforce the restitution

of conjugal rights by a husband against his wife, or a wife against her husband. Consequently, persons can be married in England, and the great objects of marriage not be attained, and the promise or vow of the spouses to live with each other till death parted them be set at defiance. Further, the law as to the restitution of conjugal rights is consistent neither with morality, nor religion, nor public policy. If a decree for the restitution of conjugal rights cannot be enforced, why continue it? Why not either abolish or enforce it? The truth is that the Marriage Laws of England have lately been profoundly modified in their social and economic aspects, and the effects of the recent changes by the Legislature have not been fully realised. Lord Penzance has said (*vide Times*, 30th April, 1891), that Jackson's case decided no new law, and merely revealed the law which was in existence. He holds "that legislation is imperatively required on this subject; but that the provisions of Mr. Hunter's Marriage Bill would increase the evils to be deplored." Whether or not we agree with his Lordship as to the remedy, all can easily see that the Laws of England as to Matrimonial Desertion are unsatisfactory, and require a remedy of some kind or another. Now, seeing that the tendency of our laws, in modern times, is to give married persons greater freedom than before as regards their property and their persons, it is clear to me that the only remedy which is likely to be adopted by the Legislature, or, indeed, is suitable to the circumstances, is to enable the innocent and unoffending party, that is to say, the person who is willing to perform the marriage vows, to have, as in Scotland, a right to a divorce after the lapse of such a period of time as might reasonably imply that the party guilty of desertion is determined permanently to live apart from the other spouse. I certainly am not in favour of making divorce as easy as it is in France, where it can be obtained by the consent of the parties;

or as in several of the States of the American Union, where it can be obtained on very easy terms.

I venture to predict that Parliament will, ere long, be compelled to legislate on this subject, and provide an adequate remedy for the unsatisfactory state of the law disclosed to the public by the Jackson decision. Some people have referred to this decision as the springing of a mine upon the public; but no mine has been sprung by the decision in Jackson's case. But most people now see that, when a married person wilfully refuses to perform the duties of marriage to his or her spouse, the law must be endowed with the power to grant divorce to an innocent person willing to perform such duties, and to leave the persons divorced to marry again, if they please, with more congenial mates.

The law should terminate a relationship which it refuses to enforce, and allow the parties to the contract to be absolutely freed therefrom. For the last three centuries, *i.e.*, from the Reformation of the Church, this, as I shall shew, has been the law of Scotland, and no injurious consequences have resulted; and, on the contrary, many unhappy marriages have been terminated to the satisfaction of the parties, and the public advantage. Without here entering into an elaborate discussion of statistics, I submit to the reader that the Law of England as to matrimonial desertion would be improved by being assimilated to the Law of Scotland.

The Queen v. Leresche.

Bearing on desertion, an important case was decided in the Court of Appeal on the 21st July last, when Lord Justice Kay delivered the judgment of the Court in *The Queen v. Leresche* (the Stipendiary Magistrate of Manchester). In that case, a man named Price and his wife separated by mutual consent, and Price made her an allowance so long

as she remained chaste. He afterwards ceased to pay the allowance, and she offered to return to live with him. She accordingly went to his house ; but he refused to admit her. She then summoned him before the magistrate for desertion. His Honour held that the refusal of the husband amounted to desertion, and made a maintenance order against the husband for 7s. a week, and refused to state a case. Price then went to a Divisional Court, which refused to interfere. He then went to the Court of Appeal, which decided that the magistrate was wrong, because, when once conjugal relations have been disturbed by mutual consent, nothing short of the renewal of cohabitation could restore the previous relations. The mere offer of the wife was not sufficient. The decision of the Court of Appeal, therefore, was that the order of the magistrate should be quashed.

I now come to the case of *Beauclerk v. Beauclerk*.

Beauclerk v. Beauclerk.

In August, 1890, a wife presented a petition for a Divorce upon the ground of adultery coupled with cruelty. The marriage had taken place in December, 1858 ; the only child of the marriage was born in 1866. The married parties separated by agreement in 1870, and had lived apart since the date of the agreement. The cruelty charged took place in 1861 and 1870 ; and the adultery expressly and specifically charged was in 1889. No act of personal violence was alleged, or proved, and the suit was undefended. The petitioner alleged that she had delayed in bringing the petition for Divorce till her son had grown up, and she could ascertain his wishes in the matter. On this state of facts, Mr. Justice Butt held that the husband's conduct did not amount to legal cruelty, and that the wife was not entitled to a divorce. On appeal, the Court, consisting of Lords Justices Lindley, Lopes and Kay, held that, even assuming

legal cruelty to have been proved against the husband, the wife's delay of 20 years in taking proceedings had not been sufficiently explained, and was so unreasonable that the Court, in the exercise of its discretion under the Divorce and Matrimonial Causes Act, 1857, § 31, ought to refuse to decree dissolution of the marriage. The judgment of Mr. Justice Butt was consequently affirmed.

In Beauclerk's case the respondent had filed no answer, and did not enter appearance. The case was heard before Mr. Justice Butt, without a jury, when the learned Judge found for the petitioner on the issue of adultery; but adjourned the case to enable the Queen's Proctor to intervene, and have the question of legal cruelty argued by counsel. From the evidence, it appeared that, at the marriage, the respondent was twenty-three years of age, and the petitioner was seventeen. The petitioner stated that her husband's repeated infidelities and his conduct to her generally had caused her much anguish of mind; and that these things had acted on her bodily health. The petitioner's son attained the age of twenty-one years in May, 1887. The medical evidence was to the effect that the petitioner had suffered from great nervous exhaustion, long fainting fits, and weak, irritable heart; and that the mental worry and excitement, caused by the respondent's infidelity, might have been fatal to her health. After argument, Mr. Justice Butt said that no legal cruelty had been proved; but that he was prepared to pronounce a decree of judicial separation on the ground of adultery. As the petitioner preferred to have her petition dismissed, the petition was accordingly dismissed. The petitioner appealed, and the case was fully argued for the appellant and for the Queen's Proctor.

Lord Justice Lindley, in delivering his judgment, said that "The case is not one in which the Court is bound to grant the petitioner the relief which she seeks; and, speaking for myself, judicially, I think, it is a case in which

we certainly ought not to do so. It would not be right." "It appears to me that we should be doing wrong if, in the face of such a delay, so excused, we were to pronounce a decree in this case. I am therefore of opinion that the appeal ought to be dismissed, with costs." Lord Justice Lopes said: "Having regard to the lapse of time, it is difficult to come to any other conclusion than this: that the wife brings her suit now, either for some collateral reason which we do not know, or because she was insensible to the wrongs she had sustained at the hands of her husband. I think, therefore, the appeal must be dismissed." Lord Justice Kay said: "I entirely agree that the delay in this case, which has been fully twenty years, is unreasonable;" and that "this is not a case in which any protection for the wife is, in the least degree, wanted;" and that he agreed "with the other Lords Justices that no explanation had been given to which we can pay any attention at all."

I may here observe that the 27th section of the English Divorce and Matrimonial Causes Act, 1857, empowers a wife to present a petition for dissolution of marriage upon the ground (*inter alia*) of adultery, coupled with such cruelty as without adultery would have entitled the wife to a divorce *à mensa et thoro*; and that a great deal of argument took place as to whether physical violence was necessary for a divorce, and how far deliberate and continuous cruelty was necessary to obtain one. Under the same section, inexcusable desertion for two years, when coupled with adultery, is a good ground for a wife getting a divorce from her husband; but it was neither stated, nor proved, as the ground for the petition in Beauclerk's case.

The English Laws of Marriage and Divorce.

Having nothing to say against the decisions in the case of *Beauclerk v. Beauclerk* (L.R., 1891, P. 189), I here

wish to make some general observations as to the English Laws of Marriage and Divorce. Marriage is the most sacred civil relationship into which persons can enter. It should not be finally dissolved, or modified, unless by a Court of Law, and on the most serious consideration of all the parties involved.

Marriage may with us, as in the Roman Law, be defined as the conjunction of a man and a woman in the strictest society of life till death separate them. Being considered a sacrament by the Canonists, it is considered by them to be a bond so sacred that no crime committed, or provocation given, by either of the parties, can give a right to its dissolution. The Roman Catholic Church admits the legality of the separation of married persons, but not of divorce. The Pope holds that he alone can dissolve marriage. The Canon Law was the Law of England till the passing of the English Divorce Act of 1857; but the English Parliament often granted divorces to husbands, but never to wives, on the ground of simple adultery. Till the Reformation of the Church in Scotland, marriage was also there held to be indissoluble by the ordinary Civil or rather Ecclesiastical tribunals in Scotland. But I venture to submit that the rights and obligations of marriage should, in law, be equal and fair between the husband and wife, who are the chief parties to the contract. I, therefore, hold that a wife, as well as a husband, in England, as now in Scotland, should be entitled to ask and obtain a divorce from her husband on proof of the simple adultery of the husband, just as now, by the Law of England, a husband is entitled to a divorce on proof of the simple adultery of his wife. This, as I have already said, has been the Law of Scotland for three hundred years, and I submit that it should be made the Law of England.

As a matter of fact, common experience shews that a woman will not usually sue for a divorce from her husband,

in consequence of an act of adultery, but only after repeated acts of adultery, forgiven, and sometimes involving dire consequences to a woman in body and mind. The most innocent woman, who has divorced her husband, is not in the same advantageous position for a future marriage as a woman who has never been married, or even as a widow. A woman will cling to her husband as long as possible. If she has had children by her husband, the ties which bind her to them will knit her still more strongly to her erring spouse than when there are no pledges of their mutual affection. But the charm of married life departs from the household by the unfaithfulness of either spouse. The obligation of faithfulness is mutual, and its breach should be followed in law by the same consequences to each of the contracting parties. Divorce is a private remedy, and may therefore be abandoned by a party entitled to sue for it. As I pointed out in a previous article in this *Review*, adultery is no longer a crime by the laws of modern nations (*vide Law Magazine and Review*, No. CCLXXVIII., for November, 1890). According to the Law of England a woman cannot get a divorce from her husband until the husband not only commits adultery, but acts against her with what our law calls legal cruelty, or commits adultery and deserts her.

A Husband and Wife should possess equal rights as to Divorce.

Why is there this difference between the legal rights of husband and wife in England in regard to divorce? Because we have not completely emerged from the barbarous condition of treating women as the slaves of men, and consequently not entitled to equal rights with men. Within the present generation, the English Law as to women's rights has been greatly changed, and before long will, in all essential legal rights and duties, be still further changed or modified. The spirit of equality and justice is spreading abroad, and is permeating the jural

relations of mankind, and introducing greater justice and equity into the laws of all civilised communities than ever existed before. No doubt, some persons argue that the relations of a wife are essentially different from those of a husband, and, inasmuch as a married woman can easily, if she chooses, introduce spurious offspring into the family of her husband, she ought to be treated with greater severity than a husband when he commits adultery. I do not admit the force of this argument; because a breach in one of the essential obligations of the contract of Marriage should be followed by the same consequences in the case of both of the contracting parties. I have to add that, if a woman can so palm off spurious as the true offspring of her husband she has, as a rule, very little occasion or reason so to do. But I prefer to rest the strength of my position on the contract of the parties themselves, and on the equality and fairness of the same consequences to all the parties following on a breach of one of the chief articles of the contract itself. If adultery is a ground for divorce, what authority is there in morals, or divine law, or equity for inequality in the case of the sexes?

The principle adopted in our law as regards a husband now is that adultery by a wife gives a right to a divorce at the instance of the husband. If so, why should there not be a right to a divorce at the instance of a wife, when the husband commits adultery? When a woman has fallen from her marriage vow she has, as a rule, been wronged, deserted, and despised. When a man falls he has been carried away by lust. True, we allow adultery and desertion, and adultery and cruelty, to be sufficient grounds for a divorce at the instance of a wife against her husband. But what cruelty? Practically such as endangers her health, or what the Judges have decided to be legal cruelty. Is danger to health the only cruelty which may be inflicted on a woman by her adulterous husband? Is

not the continuous, open, or domestic adultery of a husband as great a cruelty to a married woman as bodily pain? In my opinion, such cruelty may be far more painful than actual bodily pain inflicted in a moment of passion or drunkenness.

Further, I wish to state that I have been astonished to find that many ordinarily intelligent people were ignorant that in England and Ireland a man must be guilty of cruelty to his wife, as well as commit adultery, before a wife can obtain divorce from her husband. But when I remember that some very capable Metropolitan Police Magistrates and country Justices actually refused to grant to married women protection orders under the Divorce Act, 20 and 21 Vict., c. 85, on the ground that, after the decision in *Reg. v. Jackson*, such orders were useless and unnecessary, I ought not to be surprised that the English people live, and have long lived, under Marriage Laws which are unworthy of a civilised people. Having only incidentally noticed Mr. Hunter's Bill to remove one or two of the iniquities of the Marriage Laws of England, I now desire to state that, while I could wish the Bill had gone further, I hope it will soon be passed into law. We ought to bear in mind that women in barbarous countries are the slaves and drudges of men; but that, in nearly all civilised countries they have obtained, or will soon obtain, their just rights as the equals of men in all essential legal rights of property and status. In every part of the world, the history of human marriage is the history of women's gradual triumph over the passions, the prejudices, and the selfish interests of men.

Having already, in my remarks on Jackson's case, said enough as to divorce for persistent and obstinate desertion, I have, in this article, said enough here as to the most recent and important cases on desertion and divorce in England. But there are other points to which I wish to direct the reader's attention.

Consortium Vitæ.

By the old law of England, a husband was entitled to damages against a third person for depriving him of his wife's society. Does an action for such damages lie since the so-called Weldon Act of 1884, when the Legislature declared that neither husband nor wife could enforce the restitution of conjugal rights to the effect of compelling either of the spouses to reside with the other? *Vide ante* 47 & 48 Vict., c. 68, § 2. I suspect that no such action can be now maintained; because the old law proceeded on the assumption that the husband was entitled to his wife's society, and now such an assumption cannot be entertained. The truth is that the ancient theory of the English Law as to the unity and identity of interest of a husband and wife has, by modern legislation and decisions, been extinguished, or at least essentially modified in some vital points, and in this point amongst others. In fact, the ancient dominion which the husband had over the wife has been abrogated and repealed. The tendency of our Marriage Laws in England, Scotland, and Ireland, is to raise every married woman to the rights of a *feme sole*, free, independent, and unrestrained. That this will not increase the unity, or identity of interest, which the English Law anciently adopted, in order to prevent, as much as possible, all occasions of domestic discontent or distrust, is absolutely certain.

Marriage Ceremonies in Great Britain and Ireland should be Uniform.

Another point is well worthy of the consideration of Law Reformers, namely, the necessity there is for establishing one system of law for England, Scotland, and Ireland in the constitution of marriage, and in the dissolution of marriage by divorce for adultery or for desertion. In Scotland, marriage may be constituted by a religious or

by a civil ceremony, or even by the simple consent of the parties. But, in England and Ireland, it must be constituted by a religious ceremony, or in the presence of a Registrar of Marriages.

The Marriage Laws of Scotland.

By the Law of Scotland, marriage is a consensual contract, which requires no particular ceremony, no written evidence, but deliberate and unconditional assent alone. Bell, in his *Principles of the Law of Scotland*, further lays down, section 1,506, that there is no restraint on account of non-age, but what proceeds from incapacity of consent, by persons under puberty. He also states that there is no necessity for publication of banns or solemnity of celebration, or particular place or time for the celebration of marriage, and that no consent is necessary from parents or guardians. In Scotland, proclamation of banns is usual, but not imperative.

Again, divorce can be obtained in Scotland by desertion for four years, by either husband or wife, as well as for simple adultery by either of them. Erskine in his *Principles of the Law of Scotland*, Book I., Title VI., § 44, states that "divorce proceeds on wilful desertion, *i.e.*, where either of the spouses deliberately and without just cause deserts or separates from the other, and thereby defeats the chief purpose for which marriage has been constituted." But, he adds, this is not only a ground sanctioned by St. Paul, but was legislatively established by the Scottish Statute 1573, c. 55. *Vide* also Matthew xix. and 9 v. Bell, in his *Principles*, section 1,535, further states: "1. The action may be raised after a year's desertion, provided no decree issue till four years expired. 2. To prevent collusion the oath of calumny is required. 3. The party complained against must be in Scotland, or if absence abroad be part of the offence, personal notice must be given, unless by concealment and ignorance of the place of

residence such service is impossible. 4. The proceedings prescribed by Statute have been, in practice, supplemented by others." Recrimination is not a good defence to an action of Divorce in Scotland.

The Marriage Laws of England.

Blackstone lays down that the Law of England considers marriage in the light of a contract, and applies to it, with few exceptions, the ordinary principles which attach to other contracts. He also states that it is the most important contract known to the law, and that puberty is the age when consent to marriage is first possible by the Law of England as well as by the Roman Law; that is to say, fourteen for males and twelve for females, and that a contract for a future marriage by a person under twenty-one is not binding.

By the English Divorce and Matrimonial Causes Act of 1857, an entirely new legal procedure and new rules of law as to Divorce and Judicial Separation were introduced into England. Previously, there had existed two kinds of Divorce—(1) *à mensâ et thoro*, and (2) *à vinculo matrimonii*. The first was granted where there had arisen supervening causes after the marriage for separation—e.g., intolerable cruelty in the husband or wife, or the adultery of either, or perpetual disease, or the commission of an unnatural offence. Here the parties could not marry again, and the issue of the marriage was not bastardised. The second was granted when the marriage was unlawful from the beginning, and bastardised the issue, and allowed the parties to marry again. By the Act of 1857, important and fundamental changes were made in the old law, which have been already referred to, or are well known to the reader. I may remind him, however, that in England and Ireland, desertion by itself is not a sufficient ground for divorce, and that cruelty or desertion for two years as

well as adultery must be proved against a husband by his wife before the latter can obtain a divorce from the former. Further, judicial separation can be obtained by the wife against the husband for his adultery or his cruelty.

By the ancient law of England, a husband, says Blackstone, could give his wife moderate correction ; but, in the reign of Charles II., this power began to be doubted. Now, however, a woman, in England, is not only protected against her husband's violence against her in any degree, but, by the decision in Jackson's case, against his very presence.

Till 1757, marriage in England was encumbered with nearly as little formality as in Scotland. But, in that year, it was expressly enacted that the consent of guardians was required for persons under twenty-one, and that the publication of banns was necessary in a lawful chapel for three successive Sundays, and that the celebration must be openly in the Parish church or chapel where marriage was usually celebrated. Certain modifications were made as regards Dissenters from the Church of England ; but they do not here require to be specified.

Proclamation of Banns and Registrar's Notice.

Now, notice, at the office of the Registrar of Births, Marriages, and Deaths, can be substituted for proclamation of banns, either in England, Scotland, or Ireland ; and marriage may, in England, be celebrated between the hours of eight a.m. and three p.m. Proclamation of banns was first introduced into the Christian Church by the Fourth Lateran Council, held in 1216, in general terms, and without specific directions, and was commanded, by the Council of Trent, Session XXIV., to be made on three successive Sundays or festival days at the public offices of the Church, by the parish priest of the parties. This command was followed by the Protestant churches of Europe after the Reformation. How far the proclamation of banns gives the

publicity required, or is of any use in modern times, is extremely doubtful. In Scotland, the proclamation of banns can be made on one and the same Sunday, on payment of a larger sum than for three successive Sundays, and a marriage can be celebrated immediately after the proclamation of banns. The proclamation of intended marriages would be most effective by public advertisement.

Domicile governs Marriage Rights as a Rule.

Inasmuch as the domicile of the husband is, as a general rule, the domicile of the wife, and the Courts where the married parties have their domicile can exercise jurisdiction in actions for judicial separation and divorce, a woman who marries a man who is domiciled in Scotland at the time of her marriage, and who afterwards removes to England, or to Ireland, and there acquires a domicile, is deprived of a legal right which, if her husband had continued to reside in Scotland, she would have had. On the other hand, a husband who resided in England or Ireland at the time of his marriage, and afterwards removed to Scotland, and there acquired a domicile, would have his legal matrimonial rights diminished; because he would be liable to be divorced by his wife for simple adultery, without cruelty or desertion. Now, considering the intimate relations of the three kingdoms, and the frequent marriages between persons of the three different nationalities, and the numerous changes of domicile of English, Scotch, and Irish people, I submit that the laws as to the constitution, and as to the abrogation of marriage by desertion, or divorce, should be uniform in all the three kingdoms of England, Scotland, and Ireland. On legal principles and public convenience, I am, I think, entitled to urge that there should be one and the same legal rule as to desertion, and not different rules of law; and that, where one of the spouses remains wilfully and obstinately apart from the other, for a definite period, say for four years, the

deserted spouse should be entitled to a full, complete, and absolute divorce. If there is any necessity for a uniform system of laws for Great Britain and Ireland, it is in the laws of marriage and matrimonial rights and obligations. Surely, there is as much need of uniform laws of marriage and divorce in the United Kingdoms as of uniform laws in Bankruptcy! And yet there is practical uniformity as to the latter in the three kingdoms, and not as to the former. Since the passing of the so-called Weldon Act of 1884 and the Jackson decision, there is, I submit, no room for argument that the Scottish Law is more just and reasonable than the English Law as to what should be the legal consequences of desertion by a husband or a wife.

Nay more, the 28 and 29 Vict., c. 64, expressly declares, in section 1, that marriages will be recognised in all parts of Her Majesty's kingdoms, dominions, and possessions, when celebrated according to the law of the places where they take place, "Provided nothing in this law contained shall give any validity to any marriage, unless at the time of such marriage both of the parties thereto were, according to the Law of England, competent to contract the same." Observe that persons may be properly married in Scotland, and not be so in England; and in some of the British Colonies, and not in England. Thus, our marriage laws are nearly in as chaotic a condition as the Marriage Laws of the United States of America, where a woman may be a wife, and her children legitimate in one State, and not in another. Yet marriage is the most important contract known to the law. It affects not only the parties married, but many persons beyond their control. It binds parties beyond the power of recall, confers on children the status and rights of legitimacy, establishes the relations of consanguinity and affinity, and is directly connected with the laws of succession. That the civil requisites

of marriage and divorce in all civilised countries are not essentially the same is most unfortunate in many instances.

Marriage with Deceased Wife's Sister.

I do not here wish to express any decided or argumentative opinion as to the marriage between a man and his deceased wife's sister, or between a woman and her deceased husband's brother. But I venture to state that, in so far as such marriages are recognised in our Colonies, or in foreign Christian countries, they should be recognised in this country as regards succession or inheritance to real or personal estate. My own opinion is that such marriages are perfectly moral, and within the rules of Christian Law, and often very convenient for the parties, and, therefore, that they should be legalised by the Legislature of this country; and further that, in so far as other rights do not interfere, the children of such marriages as are in existence at the legalising of such marriages should have the full rights of lawfully born children. The advocates and supporters of the Deceased Wife's Sister Bill ought, however, to remember that existing rights should be upheld and defended, and that *ex post facto* laws are essentially unjust and sometimes cruel in their operation.

Till 1835, the proximity of relationship of affinity between a man and his deceased wife's sister as a prohibition against marriage was a canonical, and not a civil or legal disability by the Law of England, and therefore did not nullify marriage between such persons, but only made it voidable by the parties themselves: *Vide* 5 & 6 William IV., c. 54. But from and after the 1st August, 1835, all English marriages within the prohibited degrees of affinity are null and void. By the Law of Scotland, marriage with a deceased wife's sister was never lawful. By the Scottish Statute, 1567, c. 15, marriage is declared to be as free as God has made it; that is to say, as it has been declared in

Leviticus, chap. xviii. and xx., and as regards affinity as well as consanguinity. By 32 Henry VIII., c. 38, it is declared that every marriage contracted between lawful persons, to wit, such as "be not prohibited by God's law to marry when solemnized in the face of the Church, and consummated with bodily knowledge, or fruit of children, shall be good and indissoluble," and that no prohibition, "God's law except," shall impeach any marriage without the Levitical degrees. As to such degrees, *vide* Leviticus, chaps. xviii. & xx.

Legitimation by Subsequent Marriage.

Here, another important difference between the Marriage Laws of England and Ireland and of Scotland deserves attention. By the Law of England and Ireland, all children born after marriage are presumed to be legitimate until the contrary is proved. According to the Law of Scotland, all the children of married persons, whether born before or after marriage, are held to be legitimate on the principle of the Canon Law that the subsequent marriage of parents legitimates the birth of children born before the marriage. But, says Bell, *Principles*, section 1,627, there must be no legal impediment to the marriage. He says, however, that it is undecided whether an intermediate marriage between the birth of the first child and the subsequent marriage of the parents of such child made such child legitimate or illegitimate. But, if a child had been born in the first lawful marriage, surely such child of such first marriage would not be disinherited by the legitimated offspring of the second marriage! By the Roman Law, children who were bastards, or born out of lawful wedlock, were legitimated by letters of legitimation from the sovereign, at the desire of their natural father, who had no lawful issue—*Vide Nov.* 89, c. 9—or by the subsequent intermarriage of the mother of the child with the man by

whom it was procreated. The Law of Scotland, in ancient times, did not agree with the Roman Law on this latter point as it now does. It now gives to children born before the marriage of their parents the full rights of legitimate children. Succession to an English Peerage must be by legitimate issue according to the rules of English Law, and not according to those of Scotch Law, and the same rule holds good in England as to the succession to real or personal estate. But, if there should be uniformity in the Marriage Laws of England and Ireland and of Scotland, the rule in Scotland as to legitimation *per subsequens matrimonium* should either be clearly and expressly extended to England and Ireland, or as clearly and expressly abrogated in Scotland. Although the English nobles, when the English clergy, at the Council of Merton, 1236, wished to make the Laws of England the same on this point as in the Canon Law, cried out "Nolumus leges Angliæ mutari," perhaps the Parliament, as now popularly constituted at Westminster, might be inclined to adopt the rule of the Canon Law and of the Law of Scotland in this particular. Provided no equitable rights have intervened, I for one do not see why the Canon and Scotch Laws on this point might not justly be adopted in England. In some of the States of the American Union, the law goes beyond the Law of Scotland, and gives to bastards a share of the real and personal estate of their parents.

As the begetting of children is the great and primary object of marriage in the Civil as well as in the Divine law, so the protection of the just and equitable rights of children as regards legitimacy and succession ought to be one of the great and primary objects of the laws of every civilised country. The custody, education and maintenance of children, whether legitimate or illegitimate, are of vital importance to the State, and therefore may rightly be made the subject of Legislative enactment. But, if people

wish to be considered as legally married, they should be obliged to give some public notification of the fact at the time when the marriage was constituted.

Promise of Marriage followed by Sexual Intercourse.

In the Law of Scotland, there exists another rule which does not exist in the Laws of England, or of Ireland, namely, that a promise of marriage—in writing, or admitted on reference to oath—when followed by sexual intercourse, entitles a woman to sue for and obtain a declarator of marriage, placing her in the position, with all the rights and under all the obligations of a married woman. Bell says, section 1,518, "That a marriage in Scotland by a promise of marriage, *subsequenti copulâ*, the sexual intercourse is not presumed, but being proved, the consent to the marriage is inferred. *Consensus non concubitus facit matrimonium.*" Few cases of this kind are ever heard of in the Scottish Law Courts. But when they are raised, the rule here mentioned is rigorously and justly enforced. For my own part, I can imagine no civil wrong against maidenly chastity and womanly virtue greater than the deprivation of a woman's honour under a promise of marriage, and a subsequent refusal to perform the promise. Here is a principle in which the Law of Scotland is more conformable to justice and equity than the Laws of England and Ireland. Will the English or the Irish people adopt the rule of Scotch Law on this point? I venture to assert that they should do so.

In passing, I may here observe that, while I am not in favour of the entire abolition of all actions for breach of promise of marriage, I am of opinion that the abolition of all actions for verbal, but not for written, promises of marriage, would be a public as well as a private advantage. Completely to deprive parties of the right of action for breaches of promise of

marriage would often lead to gross injustice. In order to prevent frivolous and groundless actions for breach of contract of marriage, the Legislature might fairly enact that to support an action for breach of promise of marriage the promise must be in writing. Marriages should be free and voluntary between the parties. *Matrimonia debent esse liberè*. By the Roman Law, an action for damages was enforceable against the party making the promise, and refusing to perform it. The Canon Law, even although the promise was made on oath, allowed, and rightly allowed, the parties to resile from their promise.

Action for Seduction.

There is an important distinction between the Law of Scotland and the Laws of England and Ireland as to seduction. By the Law of Scotland, a woman, if of age, and if not of age by her next friend, can sue in her own name against her betrayer for damages for seduction. But, by the Laws of England and Ireland, a woman must sue her seducer for damages, by means of her father, or employer, on the fiction that the one, or the other, has suffered damage by the defendant's wrong! This instance shews the essentially different aspects from which the Law of Scotland and the Laws of England and Ireland view wrongs inflicted by men on women. In justice, equity, and morality, I submit that the Scotch Law, deriving its great principles of justice, on this point, from the Civil Law, or from the Canon Law, is greatly superior to the Laws of England and Ireland in relation to the rights and obligations of the sexes towards each other.

Rule Nisi in Divorce.

When a Decree of Divorce is granted by a Judge in Scotland, it becomes absolute, at once, subject to appeal, as in ordinary cases, to the First or Second Divisions of

the Court of Session, and thereafter to the House of Lords. But, when a Decree of Divorce is granted by a Judge in England, it does not become absolute till six months thereafter, and is subject to appeal to the Court of Appeal in Matrimonial Causes, and to the House of Lords. I have to suggest that the decree *nisi* in English divorce cases should be abolished, and that the decree should be, at once, made absolute, but subject to appeal as in ordinary cases to the Court of Appeal, and subsequently to the House of Lords.

Conclusions.

I have now come to the end of my proposals for the reform of the Marriage Laws of England, Scotland, and Ireland, and submit to the reader's consideration—1st. That our Marriage Laws should be made uniform in all the three kingdoms. 2nd. That contumacious desertion, for four years, by a husband or wife, in England or Ireland, should, as in Scotland, be a sufficient ground of divorce. 3rd. That simple adultery by a husband as by a wife in England or Ireland should also, as in Scotland, be a sufficient ground for divorce. 4th. That the Civil constitution of marriage in England, Scotland, and Ireland should be made the same. 5th. That a husband should be entitled to marry his deceased wife's sister, and a wife her deceased husband's brother. 6th. That, consistently with the recognition of existing rights, the children of married persons, whether born before or after marriage, should be held to be legitimate. 7th. That a promise of marriage, followed by seduction, should be sufficient in law for a declaration of marriage. 8th. That a woman of full age, or, if in minority, by her next friend, may obtain damages against a seducer, without proving loss of service. 9th. That a Decree of Divorce or Judicial Separation in England or

Ireland should be made absolute at once, but subject to appeal as in ordinary cases.

ALEXANDER ROBERTSON.

II.—CONTEMPT OF COURT.

IV.—THE LIMITS OF THE JURISDICTION.

§ i. *Generally.*

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Inferences deducible at Common Law—Superior Court ample jurisdiction to punish contempts in face and out of doors—Inferior Court: jurisdiction limited to contempts in face—Court not of record no jurisdiction in contempt—Power of removal and exclusion—Definition and note of Court of Record—Courts of Record by statute—Commissioners under the Great Seal.

ii. *Persons and Place.*

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§ ii. *Superior Courts of Record.*

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Judge in Court may commit for contempt at Chambers—Attachment in criminal matter should be ordered in open Court—Doubtful if Judge at Chambers can commit.

(iv.) *High Court in Bankruptcy.*

Generally—Jurisdiction does not extend to Registrar—Matter to be heard and determined in open Court—Witnesses—Obstruction of Officers—Arrest.

(e.) *The Judge in Lunacy.*

Comment—Interference with business in Offices—Attempt to influence Judge—Interference with committee—Marrying lunatic—Interference with property—Action in name of next friend of lunatic after inquisition—Malicious use of commission.

(f.) *Judges trying Election Petition.*

Parliamentary Elections Act—Court of Record with power and jurisdiction of a Judge of a Superior Court—Witnesses—Judge at Chambers.

(g.) *Central Criminal Court.*(h.) *Palatine Courts of Lancaster and Durham.*§ iii. *Inferior Courts of Record.*(a.) *County Courts.*(i.) *Generally.*

Inferior Courts of Record—Jurisdiction confined and limited by County Courts Act—Wilful insult to Judge—Juror—Witness—Registrar—Bailiff—Officer—Interruption of proceedings—Power of Judge—May commit without warrant till adjournment—No jurisdiction to commit for contempt out of Court—Interrupting delivery of judgment—Judge the proper judge of a contempt within the Act.

(ii.) *In Bankruptcy.*

More ample jurisdiction—"Open Court."

(b.) *Borough Courts.*

Mayor's Court—City of London Court—Salford Hundred Court—Liverpool Court of Passage—Bristol, Tolzey and Pie Poudre Court—Derby Court of Record—Exeter Provost Court—Kingston-upon-Hull Court—Newark Court of Record—Northampton Borough Court—Norwich Guildhall Court—Peterborough Court of Common Pleas—Preston Court of Pleas—Romsey Court of Pleas—Southwark Court of Record.

(c.) *Other Local Courts.*

University Courts—Cinque Ports Courts—Court of Vice-Warden of Stannaries—Barmote Courts—Court-leet—Courts of sewers.

(d.) *Courts of Justices of the Peace.*

Quarter Sessions—Petty Sessions—Magistrates not in Sessions—Witnesses.

(c.) Coroner's Court.

Power to secure privacy.

§ iv. *Various Statutory Courts.*

Railway and Canal Commissioners—Courts-Martial—Revising Barrister.

§ v. *Ecclesiastical Courts.**Note I.—The Queen's Courts out of Great Britain and Ireland.*i. Application for *habeas* or *certiorari*.

ii. Colonial Courts and the Judicial Committee.

Note II.—Contempt of Parliament.

Imperial Parliament—Commons—Legislative assemblies other than the Imperial Parliament.

Note III.—Jurisdiction—Person and Place.§ i. *Generally; Courts Superior and Inferior, and Courts not of Record.*

AT Common Law every Court that sits in England sits under the authority of the Queen. But all Courts have not the same connection with the Crown. All Courts of Record are the Queen's Courts in right of her Crown and Royal dignity, but the Superior Courts of Record administer justice directly by the authority of the Queen *in curia*.

So where we find that a Court is a Superior Court of Record we infer that by virtue of its immediate connection with the Presence it has power to punish a contempt of itself, whether committed in the face of the Court or without the Court, as a contempt of the Sovereign, by any punishment not cruel, unusual, or excessive, as by fine, by imprisonment, by putting the party on terms, by causing the contemner to make restitution, or by combining two or more of these modes. Where we find that a Court is an Inferior Court of Record we infer it has power to punish a contempt committed in its face as a contempt of the Queen's writ and commission under which it sits. Generally such a Court has power to fine and imprison, but this is not, perhaps, a universal rule. The imprisonment should be for

a time certain, and the punishment altogether must be more strictly determined by the particular power of the Court in accordance with settled practice and long usage. A Court not of Record has no power to punish as for contempt, but it has, in common with every Court, the power of removing and keeping excluded for a necessary time those who obstruct and interrupt its proceedings.*

A Court of Record is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the Records of the Court. But the very erection of a new jurisdiction with power to fine and imprison makes it instantly a Court of Record.†

A Court may be created a Court of Record by statute. If a Court is declared a Court of Record the inference is that it has power to fine and imprison for contempt. But a

* 2 Hawk. P.C., Bk. 2, c. i.; *Jurisdiction of the Lords' House*, Hale (Hargrave, 1796); Bl. 3 Com. 4, 4, *ib.* 4; *Godfrey's Case*, 1615, 11 Rep. 42a; *Beecher's Case*, 1609, 8 Rep. 60a; *Bushell's Case*, 1670, Vaugh. 135; *Rex v. Flower*, 1799, 8 T.R. 314; *Ex parte Fernandez*, 1861, 30 L.J. C.P. 321; *In re Pater*, 1864, 33 L.J. M.C. 142 Q.B.; *Mayor of London v. Cox*, 1867, L.R. 2 H.L. 252, opinion delivered to the Lords by Willes, J.; *Reg. v. Lefroy*, 1873, L.R. 8, Q.B. 134, S.C. *Ex parte Jolliffe*, 42 L.J. Q.B. 121; *Griesley's Case*, 1578, 8 Rep. 38a; *Rex v. Davison*, 1821, 4 B. & Ald. 329; *Rex v. James*, 1822, 5 *ib.* 894. See also the section dealing with the Queen's Courts out of England, *infra*, and the next Article of this series. *Spilsbury v. Micklethwaite*, 1808, 1 Taunt. 146, Lord Mansfield, C.J.; *Garnett v. Ferrand*, 1827, 6 B. & C. 611. In his opinion prepared in *Rex v. Almon*, 1765, Wilmot, Op. 243, Wilmot, C.J., in terms concedes the power of punishing contempts *in facie* to all Courts whether of record or not, but he was really distinguishing between superior and inferior Courts as to the jurisdiction to punish libels on the Judge, *i.e.*, the Court, as a contempt of the Court, and if his words are to bear their literal meaning, then they conflict with every other authority with which I am acquainted.

† Co. Lit., 260a; Bl. 3 Com., pp. 24, 25; *Bonham's Case*, 1609, 8 Rep. 114a, *ib.* 107a; *Godfrey's Case*, *ubi supra*; *Oldbery v. Stafford*, 1675, Sid. 145, S.C. *Rex v. Stafford*, 1 Keb. 521; *Grocwelt v. Burwell*, 1701, 1 Salk. 200, *per* Holt, C.J.; *Kemp v. Neville*, 1861, 31 L.J. C.P. 158.

Court may be a Court of Record for some purposes, though not to all intents*, and the powers of the particular Court must depend upon the construction of the particular statute.†

Where the authority of Commissioners is derived from the Great Seal, a contempt of the Commission is a contempt of the Great Seal, and is punishable by the Lord Chancellor accordingly.‡

ii. *Persons and Place.*

With the exceptions of the Sovereign,§ foreign sovereigns, ambassadors and ministers and persons attached to their suite (unless, being subjects of the Queen, they have expressly waived their privilege of exemption from jurisdiction as a condition of their acceptance in a diplomatic character),|| any Judge, acting judicially,¶ and, it would seem, a Corporation,** all persons present in any

* Hale, *Jurisdiction of the Lords*, c. vi.

† *Rex v. Faulkner*, 1835, 4 L.J. (N.S.) Ex. 308; *Van Sandau* (printed *Sandau*) v. *Turner*, 1845, 14 L.J. Q.B. 154; *Green v. Elgie*, 1843, *ib.* 162; *Watson v. Bodell*, 1845, *ib.* Ex. 281; *Reg. v. Lefroy*, *ubi supra*; *McDermott v. Judges of British Guiana*, 1868, L.R. 2 P.C. 341, 361, 363.

‡ *Commissioners of Charitable Uses v. Hicks*, 1731, 1 Dick. 61; *Ex parte Dixon*, 1803, 8 Ves. 104; *Ex parte Page*, 1810, 1 Rose 1; *Elliot v. Halmarack*, 1816, 1 Meriv. 302; *Reg. v. Maidenhead*, 1882, 9 Q.B.D. 494, 500, Jessel, M.R. The above section contains what may be called a Common Law statement, the different Courts are more particularly considered hereinafter.

§ 12 Car. 2, c. 30; *Ex parte Fernandez*, 1861, 30 L.J. C.P. 321, 331, 332, *per* Willes, J.

|| S.C. S. & O. in P.I.L., pp. 297, 391, 408; *Macartney v. Garbutt*, 1890, 24 Q.B.D. 368. The exemption does not extend to the non-diplomatic agents of a foreign State, *Republic of Paraguay v. Lynch*, W.N., 1872, p. 48. If a person of the above description (in the text) comes voluntarily into Court, he may render himself amenable to the jurisdiction. See S.C. S. & O., *ubi supra*.

¶ Justice of the Peace using contemptuous language towards another Justice at the Sessions, *Hawkins, P.C.*, c. 22 (p. 206, ed. 1824), for *inter pares non est potestas*.

** See *O'Shea v. O'Shea* (*Freeman's Journal*), *Times*, 19th Feb., 1890, *Butt, J.*

Court of Record, and all persons committing an act of contempt within the jurisdiction of any superior Court of Record, and receiving sufficient notice of the charge against them, are subject to the jurisdiction to punish as for contempt, whether, for instance, they be members of either House of Parliament, or whether, for instance, they be attending, or journeying to or from, a Court, or no.*

§ ii. *Superior Courts of Record.*

(a.) *The House of Lords.*

The House of Lords is the Court of Her Majesty the Queen in Parliament, and is not only a superior Court, but the highest Court in the land.† It is sufficient that the order or warrant should state a committal for contempt of the House. No other Court has any jurisdiction at all to inquire in any proceeding of the highest Court in the land,‡ and a committal by the Lords for six months certain, and until a fine be paid, is not put an end to by the termination of the Session.§

When a party's cause is actually in the paper for hearing, and his presence in London is, in any reason, attributable to the desire to attend the hearing of his cause, it

* Bl. 4 Com. 285; *Wilkinson v. Boulton*, 1652, 1 Lev. 162 (peer—inferior court); *Butler v. Freeman*, 1756, Amb. 301; *Bathurst v. Murray*, 1801-2, 8 Ves. 74; *Kent v. Burgess*, 1840, 11 Si. 361; S.C. *Burgess v. Kent*, 10 L.J. Ch. 100 (wards); *Ex parte Dakins*, 1855, 24 L.J. C.P. 131 (Queen's servant); *Rex v. Clement*, 1821, 4 B. & Ald. 218; *Long Wellesley's Case*, 1831, 2 Ru. & My. 639; *Lechmere Charlton's Case*, 1837, 6 L.J. (N.S.) Ch. 185; *In re Gent, Gent-Davis v. Harris*, 1888, 40 Ch. D. 190 (Parliament); *In re Preston*, 1883, 11 Q.B.D. 545 (attending Court). See Note III. to this Article.

† *Jurisdiction of the Lords' House*, Hale (Hargrave, 1796); Appellate Jurisdiction Act, 1876, s. 4; *Earl of Shaftesbury's Case*, 1677, 1 Mod. 144; 6 St. Tr. 1269; *Stockdale v. Hansard*, 1839, 8 L.J. (N.S.) Q.B. 294.

‡ *Earl of Shaftesbury's Case*, ubi supra; *Rex v. Flower*, 1799, 8 T.R. 314.

§ *Ib.*

is a breach of privilege to procure his arrest on civil process.*

The House may forbid any report of any proceeding in it, but that authorised by the House to be printed and published.†

A contempt of the House can be committed in that part of the United Kingdom from whence the cause comes, and also in that part of the United Kingdom in which the House is sitting.‡

If appeals are heard during the prorogation of Parliament, in accordance with the statutory provision, all orders and proceedings of the House in relation to appeals and matters connected therewith during such prorogation are as valid as if Parliament had then been sitting.§

If on the occasion of the dissolution of Parliament the Lords of Appeal are authorised, by writing under the Queen's sign manual, to hear and determine appeals during the dissolution of Parliament, the Lords of Appeal may, during such dissolution, hear and determine appeals and act in all matters in relation thereto in the same manner in all respects as if their sittings were a continuation of the sittings of the House of Lords, and may in the name of the House of Lords exercise the jurisdiction of the House of Lords accordingly.||

* *Persse v. Persse*, 1856, 5 H.L.C. 671 (appeal from Ireland—application at bar to discharge—discharge, but under circumstances of case, neither solicitor here, nor solicitor in Ireland for whom he acted, dealt with as for breach of privilege).

† *Lord Melville's Case*, 1806, 29 St. Tr. 550, n.; *Gurney v. Longman*, 1806, 13 Ves. 493; *Bathurst v. Kearsley*, *ib.* 494, cited in *Gurney v. Longman*; *Lord Cardigan's Case*, Lords' Journals, vol. lxxiii., p. 46.

‡ *Persse v. Persse*, *ubi supra*.

§ Appellate Jurisdiction Act, 1876, s. 8.

|| *Ib.*, s. 9. See further generally Note II. to this Article, and *Shedden v. Patrick*, 1869, L.R. 1, Sc. & D. 470, 481, *et seq.*

(b.) *Court of the Lord High Steward.*

This Court is "probably a remnant of the *Curia regis*."* There can be little doubt but that it has full power to protect its own jurisdiction.†

(c.) *Judicial Committee of the Privy Council.*

The power of the Privy Council to commit, except on statutory authority, is more than doubtful.‡ It would appear that by virtue of the Act 3 & 4 Will. IV., c. 41, the Judicial Committee has the same powers as the High Court, except, perhaps, that when sitting as an Ecclesiastical Court it can exercise its authority only in the manner of an Ecclesiastical Court.§

(d.) *Supreme Court of Judicature.*

The Supreme Court is in some respects a reconstruction of the *Curia regis*.|| The Court of Appeal is a Superior Court of Record,¶ and the High Court of Justice is a Superior Court of Record.** Each Court, and each Division of the High Court, possesses the more ample jurisdiction.††

The Court has jurisdiction to restrain a threatened contempt,‡‡ and to make any order to preserve the purity of

* 1 St., *Hist. Cr. Law*, 93.

† 2 Hawk. P.C., Bk. 2, c. 10, p. 93, note (ed. 8); Bl. 4 Com. 258.

‡ Hale, *Jurisdiction of the Lords*, p. 5; *Petition of Right*, p. 5 (3 Car. 1, c. 1.)

§ Ss. 19, 28; Jud. Act, 1873, s. 76; *Barton v. Reg.*, 1840, 2 Mo. P.C. 19; *Martin v. Mackonochie*, 1878, 3 Q.B.D. 730, 749, *per* Cockburn, L.C.J.; *Mackonochie v. Lord Pensance*, 1881, 6 App. Cas. 424; Speech of Lord Blackburn. As to Ecclesiastical Courts, see § v, *infra*.

|| Mem. 8 App. Cas. 4.

¶ Jud. Act, 1873, s. 18.

** *Ib.*, s. 16.

†† S. i., *supra*. Cases since Jud. Acts, cited Arts. I.-III., and *per tot.*

‡‡ *Kúcat v. Sharp*, 1883, 52 L.J. Ch. 134; 48 L.T. 64; 31 W.R. 227.

the administration of justice in a proceeding pending before it.*

So the Court may prohibit the publication of any account of any pending proceeding, and a publication, though accurate and fair, in contravention of an announcement from the Bench, is a contempt.† And where there has been no such order or announcement, a party will be restrained by injunction from making public, in pamphlet form, under the guise of a report, his own impressions of the case,‡ from circulating amongst parties to similar actions, and the members of the plaintiff's profession, a print of the Statement of Claim, with marginal notes abusive of the plaintiff,§ or from preaching a sermon "with special reference to the trial in which the town is so deeply interested,"|| and newspaper printers and publishers from publishing articles of a tendency to prejudice the trial.¶

So, also, a proceeding which is an abuse of the process of the Court will be stayed,** and persons will be restrained from communicating with a witness for the purpose of obstructing the course of the trial,†† or from communicating with a ward against the wishes of her father,‡‡ a party from advertising a sale by order of the Court, the conduct of which had been given to an independent firm of

Rex v. Clement (Observer), 1821, 4 B. & Ald. 218. † *Ib.*

‡ *Coleman v. West Hartlepool Ry. Co.*, 1860, 8 W.R. 734.

§ *Kiteat v. Sharp*, *ubi supra* (which see as to letters marked "private" sent to a person who has refused to hold any communication with the writer).

|| *Mackett v. Herne Bay Commissioners*, 1876, 24 W.R. 845.

¶ *Guilding v. Morel*, 1888, 4 T.L.R. 198 (*The Stock Exchange*). See also *Brook v. Evans*, 1860, 29 L.J. Ch. 616.

** *Coxe v. Phillips*, 1736, Lee, Cases t. Hardwicke, 287; *Hoskins v. Berkeley*, 1791, 4 T.R. 402.

†† *Lewis v. James*, 1887, 3 T.L.R. 527.

‡‡ *Iredell v. Iredell*, 1885, 1 *ib.* 260. See also *Sumner v. Kingscote*, 1885, *ib.* 351; *Scott v. Padwick*, 1887, 3 *ib.* 675; S.C. (second motion), 1888, 4 *ib.* 569.

solicitors,* a tenant from removing hay and other produce off a farm let to him by a receiver,† persons claiming a right of common, abandoned for several years, over an estate in possession of a receiver, from turning cattle on the lands, or from replevying against the receiver impounding the cattle,‡ a railway company from taking proceedings under the Lands Clauses Act to take possession of lands in the possession of a receiver,§ and persons forcibly ousted by a receiver from prosecuting an indictment against the agents of the receiver affecting the ouster.||

(i.) *Judge Sitting Alone in Court.*

Any Judge of the High Court sitting for the trial of causes and issues in Middlesex or London, at any place accustomed before the Judicature Acts, or at the Royal Courts, constitutes a Court of the High Court, and can exercise the jurisdiction.¶ And if a Judge is not confined, by statute or otherwise, to sit in any particular place, he may commit in any place when and where he constitutes a superior Court.**

(ii.) *Court of Assize.*

A Court of Assize†† is a part of the High Court, and a

* *Dean v. Wilson*, 1878, 10 Ch. D. 136.

† *Walton v. Johnson*, 1848, 15 Sim. 352.

‡ *Johnes v. Cloughton*, 1822, Jac. 573, Lord Eldon, L.C. See *Gardner v. Sharp*, W.N., 1867, p. 65.

§ *Tink v. Rundle*, 1847, 10 Beav. 318.

|| *Turner v. Turner*, 1851, 15 Jur. 218.

¶ Jud. Act, 1873, s. 30; Order in Council, 22 May, 1883; Supreme Court of Judicature (London Causes) Act, 1891 (54 Vict., c. 14); *Rex v. Davison*, 1821, 4 B. & Ald. 329; *Ex parte Fernandez*, 1861, 30 L.J. Ch. 321, 337.

** *In re Clarke*, 1842, 11 L.J. Q.B. 75 (committal by Lord Langdale, M.R., at his private house). See Jud. Act, 1873, s. 26 and note thereto in A.P.

†† Meaning a Court of Assize, a Court of oyer and terminer, and a Court of gaol delivery, or any of them. Interpretation Act, 1889 (52 & 53 Vict., c. 63), s. 13 (4) (5); *Ex parte Fernandez*, 1861, 30 L.J. C.P. 321; *In re McAleese*, 1873, Ir. R. 7 C.L. 146 (*Ulster Examiner and Northern Star*—comment).

Commissioner of Assize, when engaged in the exercise of his jurisdiction, constitutes a Court of the High Court.*

(iii.) *Judge at Chambers.*

A Judge in Court has power to commit for a contempt at Chambers.† It has been said to be clear that before the Judicature Acts a Judge at Chambers had no power to commit for contempt,‡ but it would appear now that a Judge at Chambers has authority to order a writ of attachment to issue, though it is better that such an order should be made in open Court, and it is extremely doubtful whether a Judge at Chambers has power to commit.§

(iv.) *High Court in Bankruptcy.*

Subject to the provisions of the Bankruptcy Act, 1883, the High Court in Bankruptcy exercises the jurisdiction of the High Court, together with the jurisdiction of the London Bankruptcy Court,|| which last-mentioned Court was a "principal" Court of Record.¶

* Jud. Act, 1873, ss. 29, 37; *Reg. v. Dudley*, 1884, 14 Q.B.D. 273, 276. See also *Rex v. Clement*, 1821, 4 B. & Ald. 218; *Rex v. Gilham*, 1828, 1 Mo. & Ma., 165; Art. II., s. i. (a); *Rex v. Davison*, 1821, 4 B. & Ald. 329; *Ex parte Fernandez*, *ubi supra*; *Wyat v. Wingford*, 1729, 2 Ld. Raym., 1528; *Barrow v. Humphreys*, 1820, 3 B. & Ald. 598 (witnesses).

† *In re Johnson*, 1887, 20 Q.B.D. 68 C.A., S.C. *Jonas v. Long*, 31 Sol. Jo. 727.

‡ *Rex v. Faulkner*, 1835, 4 L.J. (N.S.) Ex. 308, 311; *Salm Kyrburg v. Posnanski*, 1884, 13 Q.B.D. 218; *Ashmore v. Ripley*, 1840, 2 Sc. N.R. 203.

§ Jud. Act, 1873, s. 39; Ord. 44, r. 24; *Salm Kyrburg v. Posnanski*, *ubi supra*; *Baker v. Oakes*, 1877, 2 Q.B.D. 171, 176; *Clover v. Adams*, 1881, 6 Q.B.D. 622; *Padgett v. Binns*, W.N. 1884, p. 10; *Amstell v. Lesser*, 1885, 16 Q.B.D. 187; *Petty v. Daniel*, 1886, 34 Ch. D. 173; *Davis v. Galmoye*, 1888, 39 Ch. D. 322, S.C., 1889, 40 Ch. D. 355; *In re Johnson*, *ubi supra*, pp. 73, 74. Note, comparing these cases, that it does not appear that s. 39 must receive the same construction in relation to every rule. Ord. 44, r. 2, gives no assistance as regards a committal. *In re Ramsay*, 1870, L.R. 3 P.C. 427, has no application. Cf. also *Kenyon v. Eastwood*, 1888, 57 L.J. Q.B. 455; 4 T.L.R. 451.

|| B.A., 1883, s.s. 92, 93.

¶ B.A., 1861, s. 65 (32 & 33 Vict., c. 71).

The jurisdiction is confined to the Judge, and does not extend to the Registrar.* Applications for the committal of any person to prison for contempt must be heard and determined in open Court.† The Registrar should report a contempt to the Judge at the earliest opportunity.‡

It is a contempt to wilfully disobey any subpcena, or order requiring attendance for the purpose of being examined or producing any document. But any witness (other than the debtor) required to attend for the purpose of being examined, or of producing any document, is entitled to conduct money and payment for expenses and loss of time,§ and the debtor or a witness may be committed for refusing to answer,|| the latter, however, being privileged on the ground of self-incrimination, though it seems that the former is not.¶

It is a contempt to obstruct the officers of the Court,** or to arrest, upon civil process, the debtor attending the proceedings.††

* *Ib.*, 1883, s. 99 (4).

† *Ib.*, s. 98, B. A. Rules, 1886, r. 6; *Kenyon v. Eastwood*, *ubi supra*.

‡ B. A. Rules, 1886, r. 88 (1), (4); *Lechmere Charlton's Case*, 1837, 6 L.J. (N.S.) Ch. 185.

§ B. A. Rules, 1886, r. 71.

|| *Ib.*, r. 88 (1).

¶ *Ex parte Schofield, In re Firth*, 1877, 6 Ch. D. 230; *Ex parte Gilbert, In re Genese*, 1886, 3 M.B.R. 223; *In re Scharrer, Ex parte Tilly*, 1888, 20 Q.B.D. 518.

** *Ex parte Page*, 1810, 1 Rose 1; *Elliot v. Halmarack*, 1816, 1 Meriv. 302.

†† *Arding v. Flower*, 1800, 8 T.R. 534. An order enforcing an order of the Board of Trade under sect. 102 (5) is not the imposition of a punishment as for contempt. *Re Tatum, Ex parte Harker*, 1889, 5 T.L.R. 574. If a witness refuses to come upon the ground that his expenses have not been paid, the right course is to call upon him to show cause why he should not be committed, and an order of the Registrar ordering such a witness to pay the costs of the adjournment is wrong. *Re Mansel, Ex parte Norton*, 1887, 3 T.L.R. 697. The Act of 1883 made a *tabula rasa*, but it may be useful to state the following principles deducible from decisions concerning committals as for contempt on the earlier statutes:—A construction will not be adopted which vests the power of

(e.) *The Judge in Lunacy.*

It* is a contempt of the jurisdiction in lunacy to comment on pending proceedings, to interfere with the conduct of business before the Master, or to attempt to influence the Judge,† to interfere with the control of the committee of the person,‡ as by getting possession by contrivance of the person of a female lunatic and marrying her,§ to attempt, apart from the Judge, to deal with the lunatic's property after inquisition, or, after inquisition to commence or continue an action by the lunatic in the name of a next friend,|| or to divert, or use, or hinder the execution of a lunacy commission in such manner that it may be diverted to or for malicious purposes.¶

punishing contempts by inference only in a Judge sitting alone and acting judicially, but not constituting a Court. *Rex v. Faulkner*, 1835, 4 L.J. (N.S.) Ex. 308. As the Judges and Commissioners had not a Common Law jurisdiction, and their offices were unknown to the Common Law, they have no other power than that given by statute, or which is a necessary incident to that power. A Court at Westminster would look to see whether the jurisdiction belonged to the Court, and whether or no there had been an adjudication for contempt, and did not, necessarily, take judicial notice of the practice of a statutory tribunal, though the statute conferred upon the tribunal all the powers and privileges of a Superior Court at Westminster. *Watson v. Dobell*, 1845, 14 L.J. Ex. 281; *Rex v. Faulkner*, at p. 312; *Green v. Elgie*, 1843, 14 L.J. Q.B. 162; *Van Sandau* (printed *Saudau*) *v. Turner*, 1845, *ib.* 154; St. Dig. Ev. Art. 58.

* Lunacy Act, 1890 (53 Vict., c. 5), s. 108.

† *Ex parte Jones*, 1806, 13 Ves. 237; *Re Sombre*, 1849, 1 Mac. & G. 116.

‡ *Packer v. Wyndham*, 1715, Pr. in Ch. 412.

§ *Ib.* (wife's personalty to be brought into Court and administered to her separate use till husband should make a settlement: wife dying without issue, payment out to husband's personal representatives).

|| *Beall v. Smith*, 1873, L.R. 9 Ch. 85.

¶ *Anon.* (in the matter of a lunacy petition), 1740, 2 *Atk.* 52, *Lord Hardwicke*, L.C. See generally *Eyre v. Countess of Shaftesbury*, 1722, 2 P. Wms. 111; *Lord Wenman's Case*, 1721, 1 *ib.* 701; Lunacy Act, 1890 (53 Vict., c. 5); Lunacy Act, 1891 (54 & 55 Vict., c. 65).

(f.) Judges trying Election Petition.

Subject to the provisions of the Parliamentary Elections Act, 1868, and the Parliamentary Elections and Corrupt Practices Act, 1878,* a Judge on the trial of an election petition has the same powers, jurisdiction, and authority as a Judge of one of the Superior Courts, and as a Judge of Assize and Nisi Prius, and the Court is a Court of Record.†

The Judge may, by order under his hand, compel the attendance of any person as a witness who appears to him to have been concerned in the election, and a refusal to obey is a contempt.‡ But the Court has no power to issue a warrant for the apprehension of any person evading service of a subpoena.§

It has been held in Ireland, by Fitzgerald, J., sitting at chambers as the Judge on the rota under the Act of 1868, that a Judge so sitting at chambers does not constitute an independent Court, and though of opinion that certain newspaper articles complained of would constitute a contempt, his Lordship refused to make any order on the motion at chambers.|| *Semble*, a contempt of an Election

* 42 & 43 Vict., c. 75. Trial to be conducted before two Judges, but otherwise any order, act, application, or thing, for the purposes of the Act of 1868, may be done by, to, or before one Judge.

† 31 & 32 Vict., c. 125, ss. 28, 29.

‡ S. 32.

§ *Heywood v. Dodson*, 1880, 44 L.T. 285.

|| *Re Tyrone Election Petition*, *Macartney v. Corry* (*Carson's Case*), 1873, Ir. R. 7 C.L. 242. See also Jud. Act, 1881, ss. 13, 14. *Municipal Election Petition*. An Election Court under the Municipal Corporations Act, 1882 (45 & 46 Vict., c. 50, s. 92), which consists of a Barrister qualified and approved as in that Act provided (*ib.*), and tries election petitions in respect of Municipal (*Ib.*, 47 & 48 Vict., c. 70, s. 35 (London)), and County Council elections (Local Government Act, 1888, 51 & 52 Vict. c. 41, s. 75), has for the purposes of such trials the same powers and privileges as a Judge on the trial of a Parliamentary election petition, except that any fine or order of

Judge, committed without the Court, as by making a speech, is punishable by the Court from which the Judge is selected.*

(g.) *Central Criminal Court.*

This Court has the same powers as a Court of Assize. The presiding Judge may forbid the publication of pending proceedings, and thereafter may punish even a fair and accurate report as a contempt.†

(h.) *Palatine Courts.*

The Court of Chancery of Lancaster and the Court of Chancery of the county palatine of Durham and Sadbergh are, within the local limits of their respective jurisdictions, as superior Courts of Record as the High Court is.‡

committal by the Court may, on motion by the person aggrieved, be discharged or varied by the High Court, or in vacation by a Judge thereof, on such terms, if any, as the High Court or Judge thinks fit (Municipal Corporations Act, 1882, *ubi supra*). By virtue of this section an Election Court is a Court of Record. (*Reg. v. Maidenhead*, 1882, 9 Q.B.D. 494 (under a similar provision of the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict., c. 60), s. 14)).

* *Youghal Election Petition (Barry's Case)*, 1869, 3 Ir. R. C.L. 537.

† 4 & 5 Will. IV., c. 36, ss. 1, 2; Interpretation Act, 1889 (52 & 53 Vict., c. 63), s. 13 (4), (5); *Rex v. Clement*, 1821, 4 B. & Ald. 218 (*The Observer*). So far as in *Bushell's Case* (1670, Vaugh. 135), Vaughan, C.J., regarded this Court as an inferior Court he was wrong. *Burdett v. Abbott*, 1811, 14 East. 1, 73, *per* Lord Ellenborough, C.J.; *Ex parte Fernandez*, 1861, 30 L.J. C.P. 321.

‡ Bl. 3 Com. 78, 79; *Ex parte Fernandez*, 1861, 30 L.J. C.P. 321, 339, *per* Willes, J.; Gilb. Hist. C.P. 190; Hale's *Jurisdiction of the Lords*, p. 3; *Mayor of London v. Cox*, 1867, L.R. 2 H.L. 257, opinion delivered by Willes, J.; *In re Longdendale Co.*, 1878, 8 Ch. D. 150; *Oulton v. Radcliffe*, 1874, L.R. 9 C.P. 189; *Laughton v. Taylor*, 1840, 10 L.J. Ex. 57, 58; *per* Lord Abinger, C.B.; Common Law Procedure Act, 1852 (15 & 16 Vict., c. 76), s. 129; *Peacock v. Bell*, 1668, Notes to 1 Wm. Saund. 96; Chancery of Lancaster Acts, 1850-1890 (13 & 14 Vict., c. 43; 17 & 18 Vict., c. 82; 53 & 54 Vict., c. 23); Palatine Court of Durham Act, 1889 (52 & 53 Vict., c. 47). Contemner without jurisdiction of Lancaster Court—Power in C.A. to enforce order, Court of Chancery of Lancaster Act, 1854 (17 & 18 Vict., c. 82), s. 7;

§ iii. *Inferior Courts of Record.*(a.) *County Courts.*(i.) *Generally.*

Every County Court* is a Court of Record,† but an inferior Court with jurisdiction as to contempt confined to the instances given, and to the extent limited by the County Courts Act, 1888.‡

If any person wilfully insult the Judge, or any juror or witness, or any registrar, bailiff, or officer of the Court for the time being during his sitting or attendance in Court, or in going to or returning from the Court, or wilfully interrupt the proceedings of the Court, or otherwise misbehave in Court, it is lawful for any bailiff or officer of the Court, with or without the assistance of any other person, by the order of the Judge, to take such offender into custody, and detain him until the rising of the Court; and the Judge is empowered, if he shall think fit, by a warrant under his

In re Longdendale Co., *ubi supra*, at p. 153, *per* Jessel, M.R., Lancaster Act, 1850, s. 17, and Durham Act, 1889, s. 17, power to Palatine Court to serve *subpœna* out of its jurisdiction—Disobedience punishable by Queen's Bench Division. In *Re Alison*, 1878, 8 Ch. D. at p. 9, Jessel, M.R., speaks of Lancaster Court as an inferior court, but this is in relation to its power to restrain proceedings in the High Court.

* Meaning a Court under the County Courts Act, 1888 (51 & 52 Vict., c. 43). The Common Law County Courts, with which the Statutory Courts have no connection (*Reg. v. Dyer*, 1849, 18 L.J. Q.B. 285), were not Courts of Record. Hale, *Lords' House*, p. 3; Bl. 3 Com. 33, 35. The same is true of Courts Baron and Hundred Courts, *Ib. Godfrey's Case*, 1615, 11 Rep. 42a. The Court of the Manor of Sheffield, which survived the County Courts Act, 1846 (9 & 10 Vict., c. 95) s. 5 & O.C. 19 March, 1847 (L.G. 10 March, 1847) is holden as a County Court.

† County Courts Act, 1888, s. 5.

‡ *Reg. v. Lefroy*, 1873, L.R. 8 Q.B. 134, S.C., *Ex parte Jolliffe*, 42 L.J. Q.B. 121. S. 89 of the Jud. Act, 1873, does not appear to affect the jurisdiction as regards criminal contempts. See *Ex parte Martin*, 1879, 4 Q.B.D. 212, S.C. *Martin v. Bannister*, 1879, *ib.* 491, C.A.; *Richards v. Cullerne*, 1881, 7 *ib.* 623, C.A.; *Levy v. Moylan*, 1850, 19 L.J. C.P. 308.

hand, and sealed with the seal of the Court,* to commit any such offender to any prison to which he has power to commit offenders† for any time not exceeding seven days, or to impose upon any such offender a fine not exceeding five pounds for every such offence, and in default of payment thereof to commit the offender to any such prison as afore-said for any time not exceeding seven days, unless the said fine be sooner paid.‡

The Court may commit without warrant till the adjournment.§ The Judge has no jurisdiction to commit as for contempt in respect of an act, as comment on a pending case, done out of Court,|| but for a person in Court to interrupt a judgment by saying, "That is a most unjust remark," is a clear contempt, for which the offender would be rightly committed.¶

Many acts may come within the provision of the statute which it would be impossible adequately to describe in words, and though, perhaps, it may be doubtful whether the Judge has jurisdiction to decide conclusively whether any particular act had brought a person within section 162, the High Court will certainly not interfere except in a case in which there is no evidence on which the Judge could by any reasonable intendment have come to the conclusion that a contempt had been committed,** or where

* If the seal be omitted the committal is bad. *Ex parte Van Sandau*, 1846, 1 Ph. 605; 1 De G. 303.

† See County Courts Act, 1888, s. 163.

‡ *Ib.*, s. 162. Assaulting bailiff or rescue, s. 48. Witnesses neglecting summons, ss. 110, 111. Protection to officers, ss. 54, 55. Jurisdiction in equity, s. 67.

§ *Reg. v. Jordan (County Court Judge of Stafford)*, 1888, 36 W.R. 589; affirmed 57 L.J. Q.B. 483; 36 W.R. 797; W.N., 1888, p. 152.

|| *Reg. v. Lefroy, Ex parte Folliffe, ubi supra*; *Reg. v. Judge of County Court of Surrey*, 1884, 13 Q.B.D. 963, 968, *per* Brett, M.R.

¶ *Reg. v. Jordan, ubi supra*.

** *Ib.*; *Levy v. Moylan*, 1850, 19 L.J. C.P. 308.

there is no act clearly stated as being the act for which the person has been punished, by reason whereof, not knowing his offence, he is not able to purge his contempt.*

(ii.) *In Bankruptcy.*

The jurisdiction in Bankruptcy is determined solely by the Bankruptcy Act, 1883.† For the purposes of its bankruptcy jurisdiction a County Court has, in addition to the ordinary powers of the Court, all the powers and jurisdiction of the High Court.‡ From which it would appear that the County Court in bankruptcy possesses the more ample jurisdiction.§

By s. 5 of the Debtors Act, 1869 (32 & 33 Vict., c. 62), orders for committal of defaulting debtors under that Act must be made, by a County Court Judge, in open Court. A County Court Judge sat, for the purpose of hearing summonses for committal under this section, and for all business except jury cases, in a small room which he also used at other times as his private room. This room communicated with a larger room, where was the usual raised bench and jury-box, by a door which was kept open during the hearing of these summonses, and the names of the parties were, if necessary, called in the larger room. The public and reporters had access to the smaller room as well as to the larger:—Held, by Lord Coleridge, L.C.J., and Mathews, J., upon an application for a prohibition,

* *Reg. v. County Court Judge of Lambeth and Jonas*, 1888, 36 W.R. 475; see *Bradlaugh v. Erskine*, 1883, 47 L.T. 618; 31 W.R. 363, Field, J.

† *Ex parte Reynolds. In re Barnett*, 1885, 15 Q.B.D. 169, 186.

‡ B.A., 1883, s. 100. See also s. 92, and with s. 100, *cf.* s. 66 of the Act of 1869, noting the difference in the wording.

§ See *Ex parte Reynolds, ubi supra*; *Reg. v. Surrey, ubi supra*. In the latter case, decided on s. 96 of Act of 1869, with which *cf.* s. 27 of Act of 1883, disobedience to a summons was apparently treated as a contempt committed out of Court, but the contempt is the non-appearance in Court. Art. III., § iii. See also ss. 91, 93, 99.

that an order for committal made under these circumstances was not made in open Court within the meaning of the Act, and could not be enforced. The objection, though technical, was not unimportant, as it was fit and required by the Legislature that orders by which liberty was to be affected should be made in open Court.*

(b.) *Borough Courts.*

All borough Courts are inferior Courts of Record at Common Law.†

The Mayor's Court is an inferior Court of Record.‡

The City of London Court is an inferior Court of Record, with the jurisdiction and authority of a County Court in addition to any other it may possess.§

The Salford Hundred Court of Record (and *Manchester Borough Court*) is a Court of Record for the trial of civil actions in the Hundred of Salford in the County of Lancaster, and the Judge has all the powers exercised or possessed by a Superior Court, or a Judge thereof.||

The Liverpool Court of Passage is a civil Court of Record for the Borough of Liverpool, holden as a County Court.¶

* *Kenyon v. Eastwood*, 1888, 57 L.J. Q.B. 455; 4 T.L.R. 451.

† 2 Inst. 325; Co. Lit. 134a; Bl. 3 Com. 79; *Laughton* (or *Laughtor*) v. *Taylor*, 1840, 10 L.J. Ex. 57 (Borough Court of Liverpool). As to jurors, Municipal Corporations Act, 1882, s. 186.

‡ *Mayor of London v. Cox*, 1867, L.R. 2 H.L. 239. See Co. Lit. 134a; *Wilkinson v. Boulton*, 1652, 1 Lev. 162 (wards); *Washer v. Elliott*, 1876, 1 C.P.D. 169; *Appleford v. Judkins*, 1878, 3 *ib.* 489.

§ County Courts Act, 1888, s. 185. See *Osgood v. Nelson*, 1872, L.R. 5 H.L. 636.

|| Salford Hundred Court of Record Act, 1868 (31 & 32 Vict., c. cxxx.) (local and personal). Provision is made by the Act for enforcing the attendance of jurors and witnesses. See also *Chadwick v. Ball*, 1885, 14 Q.B.D. 855. Whether the Judge has the more ample jurisdiction, *qu.* See *Reg. v. Lefroy*, 1873, L.R. 8 Q.B. 134, s. 1, *supra*.

¶ 4 & 5 Will. IV., c. xcii.; 7 *ib.*, c. xcvi.; 16 & 17 Vict., c. xxi.; O.C. 9 March, 1849; L.G. 10 *ib.*, p. 990; 31 & 32 Vict., c. 71, s. 25; 32 & 33 Vict., c. 51, s. 6; *Reg. v. Mayor of Liverpool*, 1887, 18 Q.B.D. 510.

The following local Courts are also inferior Courts of Record:—

Bristol, Tolzey, and Pie Poudre Court.*

Derby Court of Record.

Exeter Provost Court.

Kingston-upon-Hull Court.

Newark Court of Record.

Northampton Borough Court.

Norwich Guildhall Court.

Peterborough Court of Common Pleas.

Preston Court of Pleas.

Romsey Court of Pleas.

Southwark Court of Record.†

York Court of Record.‡

(c.) *Other Local Courts are:—*

The Courts of the Chancellors of the Universities of Oxford and Cambridge, which are Courts of Record, with power to fine and imprison.§

* See *Braham v. Watkins*, 1846, 16 L.J. Ex. 9; *Ex parte Fernandez*, 1861, 30 L.J. C.P. 333, *per* Willes, J.; *Ex parte Sear*, 1881, 17 Ch. D. 74; Bl. 3 Com. 32.

† As to this Court, 8 & 9 Vict., c. cxxvii., s. 13. By divers orders in Council to be found indexed in the Index to the *Gazette*, under the names of the respective cities or towns, the whole or parts of the Common Law Procedure Acts, the Borough and Local Courts of Record Act, 1872 (35 & 36 Vict., c. 86), and other statutes have been applied to the Courts, or some of them, mentioned above. See also Inferior Courts Judgments Extension Act, 1882 (45 & 46 Vict., c. 31). The above list is from the Annual Practice note to Jud. Act, 1884, s. 24.

‡ *Lond. Ga.*, 1890, p. 2892.

§ 2 Bacon, Abr., p. 349 (ed. 1832). See *Re the Chancellor of Oxford and Taylor*, 1841, 1 Q.B. (N.S.) 952; *Ginnett v. Whittingham*, 1885, 16 Q.B.D. 761; The Oxford University Act, 1862 (25 & 26 Vict., c. xxvi.), s. 12; County Courts Act, 1888, s. 176. See *Statuta Universitatis Oxoniensis, Tit. de Judiciis*, § i. *De jurisdictione Universitatis tuenda*. As to Cambridge, *Kemp v. Neville*, 1861, 31 L.J. C.P. 158; 19 & 20 Vict., c. xvii. (local and personal). If the office of the High Steward of the University of Oxford were called into action, the Court would sit under the authority of the Great Seal, Bl. 4 Com. 275; § i., *supra*.

*The Courts of the Lord Warden of the Cinque Ports.**

The Court of the Vice-Warden of the Stannaries, which is an inferior Court of Record.†

The Barmote Courts, which are Courts of Record by statute, and in which persons wilfully insulting or obstructing the steward, witnesses refusing to answer, and jurors neglecting to attend are liable to a fine not exceeding £10.‡

The Court-leet, which is an inferior Court of Record, the Judge whereof, that is, the steward, may impose a reasonable fine in respect of a contempt in the face of the Court, but cannot, it would seem, imprison.§

Courts of Sewers, which are inferior Courts of Record with power to imprison, and, probably, to fine, as for contempt in the face of the Court, and which sit under the authority of the Great Seal.||

* As to which see Judicature Commission Reports, *London Gazette*, 1868-1869 [4130]; 1872 [631]; 1874 [957].

† Bl. 3 Com. 79; 16 Car. 1, c. 15; Bac. Abr. t. Courts of the Stannaries; 6 & 7 Will. IV., c. 106, ss. 9, 10, 35; 11 & 12 Vict., c. 83; 18 *ib.*, c. 32, s. 35; Stannaries Act, 1869 (32 & 33 *ib.*, c. 19), ss. 27-43; County Courts Act, 1888, s. 177; Jud. Act, 1873, s. 18 (3).

‡ 14 & 15 Vict., c. 94.

§ Bl. 4 Com. 270; Hale, *Lords' House*, c. 2, p. 3; *Griesley's Case*, 1578, 8 Rep. 38a; *Godfrey's Case*, 1615, 11 *ib.* 42a. As to the sheriff's tourn, see Hale, *l.c.*; 2 Hawk., p. 93 (ed. 8); *Ex parte Fernandez*, 1861, 30 L.J. C.B. 333, *per* Willes, J. See also *Lord Cobham's Case*, 1590-1, 1 Leon. 216 (juror), and note that the case is no authority, the report concluding with an adjournment and no decision.

|| 23 Hen. VIII., c. 5; 3 & 4 Ed. VI., c. 8; 13 Eliz., c. 9; 3 Will. IV., c. 22; 4 & 5 Vict., c. 45; The Land Drainage Act, 1861 (24 & 25 Vict., c. 133); *Crossman v. Bristol, etc., Ry. Co.*, 1863, 1 Hen. & M. 531; 11 W.R. 981; *Oldbery v. Stafford*, 1675, Sid. 145, S.C. *Rex v. Stafford*, 1 Keb. 521. The Court cannot fine a juror as for contempt unless it is complying with its own usual practice. *Ex parte Taylor*, 1829, 3 Y. & J. 91 (See 3 & 4 Will. IV., c. 22), § 1, *supra*. As to the College of Physicians, see 14 & 15 Hen. VIII., c. 5; 1 Mar., Sess. 2, c. 9; 21 & 22 Vict., c. 90; 23 & 24 *ib.*, c. 66; *Bonham's Case*, 1611, 8 Rep. 107a; *ib.* 114a.

(d.) Courts of Justices of the Peace.

A Court of Quarter Sessions is an inferior Court of Record, and as such has attached to its jurisdiction, and inherent in it, a power to punish a contempt committed in the face of the Court, and a necessary power of preventing that which, in the face of the Court, leads to the obstruction of the administration of justice in the Court. The Court itself must be the judge of the contempt, and if there were reasonable grounds on which the conclusion might have been drawn that a contempt had been committed, the Queen's Bench Division will not interfere on a rule for a *certiorari*. For the function of the superior Court is confined to seeing that the inferior Court has not acted without jurisdiction, and it is not the duty of the superior Court to act as a Court of Appeal on such a procedure, and to say who was right and who was wrong.*

So where counsel, in the course of his speech, addressed observations to a juryman which the Court of Quarter Sessions deemed to have been made for the purpose of insulting the juryman, and not to have been made in good faith in the honest discharge of his duty to his client, and was, thereupon, refusing to withdraw and apologise, fined £20 by the presiding Judge, the Court of Queen's Bench discharged a rule which had been obtained for a *certiorari*.*

Justices at Petty Sessions constitute an inferior Court of Record, with power to imprison as for contempt in its face, but not, perhaps, with power to fine.†

Magistrates exercising their office, but not in Sessions, if they have power to commit as for a contempt in their presence (which has been several times discussed, but never

* *In Re Pater*, 1864, 33 L.J. M.C. 142 Q.B., Cockburn, C.J.; Blackburn, Mellor, and Shee, JJ See Bl. 4 Com. 268, 269

† Bl. 4 Com. 268, 269; *Bonham's Case*, 1609, 8 Rep. 380; *Godfrey's Case*, 1615, 11 ib. 42a.

decided),* must commit by warrant in writing, and a commitment by word of mouth is insufficient.† A warrant expressed to be for contempt in the face of the Court by two Justices of the Peace, not sitting in sessions, that the prisoner “be kept in custody until he shall be discharged by due course of law” is bad on the face of it, for not committing for a time certain, and for not disclosing any manner whereby the prisoner may obtain his discharge.‡

A witness refusing to give evidence before a grand jury is guilty of contempt, and may be dealt with by Quarter Sessions. But it seems that the proper punishment is fine, and imprisonment till the fine be paid, and not imprisonment as in itself the punishment.§ A witness not obeying a Justice’s summons may be compelled to attend by warrant. A witness refusing to answer, without offering any just excuse, may be committed for any time not exceeding seven days, unless in the meantime he shall consent to be examined and answer. But before committal for refusal to give evidence, a party ought to be fully apprised that there is some information or charge then under inquiry before justice.||

(e.) *Coroner’s Court.*

The Court of the Coroner is an inferior Court of Record,¶ of which the Coroner is the Judge, against whom no action

* *Rex v. Langley*, 1704, 2 Salk. 698; *Rex v. Revel*, 1721, 1 Str. 420; *Pettit v. Addington*, 1791, Peake, N.P.C. 62; *Mayhew v. Locke*, 1817, 7 Taunt. 63 (all these as to contumelious words).

† *Mayhew v. Locke*, *ubi supra*.

‡ *Rex v. James*, 1822, 5 B. & Ald. 894.

§ *Rex v. Lord Preston*, 1692, Salk. 278, Holt, C.J.

|| 11 & 12 Vict., c. 42, s. 16; Summary Jurisdiction Act, 1848 (11 & 12 Vict., c. 43) s. 7; *Ib.*, 1879 (42 & 43 Vict., c. 49), s. 36; *Bennet v. Watson*, 1814, 3 Ma. & S. 1; *Cropper v. Horton*, 1826, 8 D. & R. 166; *Evans v. Rees*, 1840, 9 L.J. (N.S.) M.C. 83. As to jurors, see County Juries Act, 1825 (6 Geo. IV., c. 50).

¶ Bl. 4 Com. 271.

will lie for anything done in his judicial capacity.* The Coroner may bind over to the peace anyone making an affray in his presence,† and the inquiry before him being a preliminary inquiry only, he is able, in his discretion, to secure for his Court absolute privacy, or to exclude any particular person whose exclusion may be necessary and proper.‡

§ iv. *Various Statutory Courts.*

The Court of Railway and Canal Commissioners is a Court of Record, which, for the purposes of the Railway and Canal Traffic Act, 1888, has, perhaps, the same jurisdiction as regards contempt as the High Court. But no person may be punished for contempt of Court except with the consent of the *ex-officio* Commissioner, who is a Judge of the High Court.§

Courts-Martial. The Army Act enables the President of a Court-martial to certify the offence of contempt by persons not subject to Martial Law, whether witnesses or others, to Civil Courts, and appears to contemplate that the Civil Court might punish such persons for contempt by the exercise of the more ample jurisdiction.||

A Revising Barrister has a statutory power of ordering and enforcing the removal from his Court of any person interrupting the business, or refusing to obey his lawful

* *Garnett v. Ferrand*, 1827, 6 B. & C. 611.

† 2 Hawk. P.C. 39 (ed. 1824). Jurors not attending, fine not exceeding £5. Witnesses refusing to answer, fine not exceeding forty shillings. Coroners Act, 1887 (50 & 51 Vict., c. 71, s. 19).

‡ *Garnett v. Ferrand*, 1827, 6 B. & C. 611.

§ Railway and Canal Traffic Act, 1888 (51 & 52 Vict., c. 25), ss. 2; 4 (2); 18 (1); 55. Cf. *South Eastern Ry. v. Ry. Commissioners*, 1881, 6 Q.B.D. 586. See § i., *supra*, and note (††) to § ii. (d) (iv.).

|| Army Act (44 & 45 Vict., c. 58), ss. 125-129. If the offender is a counsel it is expressly enacted that he may be removed by order under the hand of the President, the offence being certified to the Civil Court. See also Army (Annual) Act, 1890; Army (Annual) Act, 1891. See § i., *supra*, and note (††) to § ii. (d) (iv.).

orders in respect of the same.* This power is not rightly exercised against a person who at the Court holden the previous year had neglected to do what the Barrister thought he ought to have done, and if that is the real reason of the order it is made without jurisdiction, and will expose the Barrister to an action, although he pleads that he expelled the person because he was disturbing the Court.†

§ v. Ecclesiastical Courts.

Ecclesiastical Courts are not Courts of Record,‡ and have, in themselves, no power either to imprison or to fine.§ It was the use of such Courts to punish contempts by excommunication, but statutory provision has been made for the punishing of contempts committed in the face of an Ecclesiastical Court by signification to the Chancery Division, or to the Chancery Court of Lancaster, as the case may be.||

Note I. to Article IV. The Queen's Courts out of Great Britain and Ireland.

i. On Application for Writ of Habeas Corpus or Certiorari.

No writ of *habeas corpus* can now issue out of England, by authority of any Judge or Court of Justice therein, into

* County Voters Registration Act, 1865 (28 Vict., c. 36), s. 16.

† *Willis v. Maclachlan*, 1876, 1 Ex. D. 376. See also Parliamentary Voters Registration Act, 1843 (6 & 7 Vict., c. 18); Parliamentary and Municipal Registration Act, 1878 (41 & 42 *ib.*, c. 26), ss. 29, 36. Cf. *Spilsbury v. Micklethwaite*, 1808, 1 Taunt. 146. Lord Mansfield, L.C.J.

‡ Bl. 3 Com. c. 5.

§ *Godfrey's Case*, 1615, 11 Rep. 42a.

|| 5 Eliz., c. 23; 53 Geo. III., c. 127; 2 & 3 Will. IV., c. 93 ("any other contempt towards such Court," but the forms in 2 & 3 Will. IV., c. 93, are to be adhered to, and they are not in terms applicable to criminal contempts out of Court); 3 & 4 Vict., c. 93; see *Rex v. Dugger*, 1822, 4 B. & Ald. 791; *Green v. Lord Penzance*, 1881, 6 App. Cas. 657; *Ex parte Bell Cox*, 1887, 20 Q.B.D. 1; *Bell Cox v. Hakes*, 1890, 15 App. Cas. 506. Courts of Survey and Courts of Wreck Commissioners do not appear to be Courts of Record; see Merchant Shipping Act, 1876 (39 & 40 Vict., c. 80).

any colony or foreign dominion of the Crown where Her Majesty has a lawfully established Court or Courts of Justice having authority to grant and issue the said writ, and to insure the due execution thereof throughout such colony or dominion (25 Vict., c. 20), and it is certainly doubtful whether a *certiorari* or writ of error from the High Court would lie, even with the *fiat* of the Attorney-General, to any Court out of England (*Reg. v. Lees*, 1858, 27 L.J. Q.B. 403). But the above cited statute does not include the Isle of Man, which though not a part of the United Kingdom is neither a colony nor a *foreign* dominion (*In re Brown*, 1864, 33 L.J. Q.B. 193), and there might arise other excepted cases (see *Ib.*; *Reg. v. Anderson*, 1861, 30 L.J. Q.B. 129), for instance, the writ would still run to Jersey, *In re Barnett*, per Blackburn, J. Hil. 1875, *Short and Mellor*, 339.

If the writ lies, and it appears that the Court has acted with jurisdiction, the Court here will credit that Court stating that the adjudication was for contempt, and according to the form and practice of that Court; which Court itself is the judge whether there has been a contempt or no, the Court in England not dealing with the question whether the decision was erroneous or no, but only looking to see whether there has been an adjudication with jurisdiction (*In re Carus Wilson (Carus Wilson's Case)*, 1845, 7 Q.B. 984; 14 L.J. Q.B. 201; *In re Crawford*, 1849, 18 L.J. Q.B. 225; cf. *Reg. v. Brennan and Gallan*, 1847, 16 *Ib.* 289).

So, where to a writ of *habeas corpus ad subjiciendum*, &c., directed to the gaoler and Viscount of the Island of Jersey, the return stated that the prisoner was committed under and by virtue of a certain sentence of the Royal Court of that Island, which sentence was set out in the return, and was to the effect that in a cause in which the prisoner was a party, just as the Court was about to give judgment, the

prisoner, in the most unbecoming tone, interrupted the Court, by protesting against the reading of the judgment and the competence of the Court, and that he, having in vain been admonished to be more respectful, was committed to prison till he had paid a fine of £10, or asked pardon of the Court, and the return further certified that the sentence was a good and lawful sentence duly and lawfully made by the Court, and that the Royal Court was a court of civil and criminal jurisdiction with an appeal only to Her Majesty in Council, it was held by the Court of Queen's Bench that upon the return the conduct stated in it might have amounted to a contempt, and, that being so, the Court would not inquire into the degree of it, that the Judges in whose presence words are used are, in reality, the only competent judges as to whether what was said and done amounted to a contempt or no, that no warrant was necessary in order to make the commitment valid, and that affidavits were not admissible to shew that the law of Jersey, as set forth in the return, was incorrectly stated (*Carus Wilson's Case, ubi supra*).

The same principles were re-affirmed in a case where the prisoner had been committed, without warrant and not for a time certain, by the Chancery Court of the Isle of Man, for publishing, in the *Mona's Herald*, a libel in contempt of that Court (*In re Crawford, ubi supra*).

ii. Colonial Courts and the Judicial Committee.

The jurisdiction and powers of a Colonial Court depend upon its constitution as may appear from its charter, or from statutes or orders in council (*Rainy v. Justices of Sierra Leone*, 1852; 8 Mo. P.C. 47; *McDermott v. Judges of British Guiana*, 1868, L.R. 2 P.C. 341). By the Common Law every Court of Record is the sole and exclusive judge of what amounts to a contempt, and the Judicial Committee can make no order by way of appeal in the ordinary manner,

as to a fine imposed as for contempt by a Court of Record (*Ib.*; *Smith v. Justices of Sierra Leone*, 1841, 3 Mo. P.C. 361; *In re Ramsay*, 1870, L.R. 3 P.C. 427). But a petition, forwarded to Her Majesty through the proper channel, may be referred to the Committee for their advice (*Ib.*, 3 & 4 Will. IV., c. 41).

Accordingly, where fines amounting together to £150 were imposed upon a practitioner in a colony in which a professional income could scarcely exceed £500, their Lordships recommended Her Majesty to reduce the sum to £60 (*Rainy v. Sierra Leone, ubi supra*).

A barrister engaged in his professional duty before the Supreme Court at Hong Kong was, without notice of the alleged contempt, or rule to shew cause, and without being heard in defence, by an order of that Court, fined, and adjudged to have been guilty of several contempts of Court in disrespectfully addressing the Chief Justice while conducting a cause. Their Lordships reported that, in their judgment, no person should be punished for contempt of Court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given to him, and, further, that it appeared that the barrister had received one sentence as for six several offences, and that in the statement of those alleged offences in the judgment pronounced by the Chief Justice, they were not satisfied that each of the six amounted to a contempt, or was legally an offence. The order was set aside and the fine remitted (*In re Pollard*, 1868, L.R. 2 P.C. 106; *cf. Emerson v. Judges of Newfoundland*, 1852-4, 8 Mo. P.C. 157).

There is no doubt as to the power of Colonial Courts to prevent advocates who misconduct themselves from practising before them (*In re Justices of Antigua*, 1830, 1 Kn. P.C. 267; *In re Monckton*, 1837, 1 Mo. P.C. 455; *In re Grant*, 1850, 7 *ib.* 141; *Bunny v. Justices of New Zealand*,

1862, 15 *ib.* 164). But to procure the officer of the Court to serve notice of a petition to the Queen upon the Judge is not such a contempt as to warrant suspension from practice for six months (*In re Downie & Arrindell*, 1841, 3 *ib.* 414). To offences which are contempts there has been attached by law and long practice a definite kind of punishment, namely, fine and imprisonment (*In re Wallace*, 1866, L.R. 1 P.C. 283). It is doubtful whether striking off the Rolls or suspension can be the proper punishment even for a contempt committed as an advocate or practitioner (*Ib.* ; *In re Downie & Arrindell*, *ubi supra* ; *Smith v. Sierre Leone*, *ubi supra*), and certainly a barrister should not be suspended from practice for a contempt committed by him not in his professional capacity, but as himself a suitor in the Court, by writing a letter to the Judge complaining of his conduct in the cause (*In re Wallace*, *ubi supra*).

Their Lordships being of opinion that the conduct of the petitioner, though improper and disrespectful, was not such as to justify an order to strike him off the Rolls, directed the petitioner to make an application to the Colonial Judges to restore him, with an expression of their opinion that if he apologised he should be restored (*Smith v. Justices of Sierra Leone*, 1848, 7 Mo. P.C. 174). An order *nisi* for striking an attorney and practitioner of the Colony of Newfoundland off the Rolls of the Court there, unless cause be shewn to the contrary in four days, made absolute upon no cause being shewn, notwithstanding an application for extension of time to prepare defence, reversed as improperly and irregularly made. (*Emerson v. Newfoundland*, *ubi supra*).

It has been held that a Judge of the Court of Queen's Bench in Lower Canada, sitting alone in the exercise of the criminal jurisdiction, under the authority of sect. 72 of c. 77 of the Consolidated Statutes of Canada, has no power to pronounce a counsel in contempt for publishing two

letters reflecting upon the conduct of the Judge, or to impose a fine (*In re Ramsay*, 1870, L.R. 3 P.C. 427. See Canada Statutes, c. 95).

Note II. to Article IV. Contempt of Parliament.

Imperial Parliament (Co. Lit. § 110a).

The Commons have exercised, and the Lords have claimed and exercised, a jurisdiction to punish contemptuous words spoken of a member of the Royal Family, as a contempt of the King, the head of Parliament (*Floyde's Case*, 1621, 2 St. Tr. 1154; 8 *ib.* 52).

The Lords have committed one of their own members for contempt of the House in the House (*Earl of Shaftesbury's Case*, 1677, 1 Mod. 144; 6 St. Tr. 1269), and, in 1799, they committed the printer of the *Cambridge Intelligencer* for a libel on a spiritual peer (*Rex v. Flower*, 1799, 8 T.R. 314). In these last two cases, upon applications for release by *Habeas Corpus*, the Queen's Bench held a general return, stating a committal for contempt of the House, sufficient, and were pretty clearly of opinion that they had no jurisdiction to inquire into any proceeding of the highest Court in the land (See also *Sir Samuel Barnadiston's Case*, 6 St. Tr. 709; Anson, *Law of the Constitution*, I., 300, 301; § ii. (a) *supra*).

House of Commons.

If ever at any time the House of Commons possessed any judicial authority (Stubbs, ii., 248, 2nd Ed.), the House was relieved thereof, at its own request, as early as the time of Henry IV. (Anson, 308). It has thus come to be doubtful whether the House can be rightly called a Court of Record (*Burdett v. Abbott*, *Burdett v. Colman*, 1811, 14 East 1, 163, K.B.; 1812, 4 Taunt. 401, Ex. Ch.; 1817, 5 Dow. 165, H.L.; *Speaker of Victoria v. Glass*, 1871, L.R. 3 P.C. 560,

569, *per* Lord Cairns). Nevertheless, whether as a constituent part of Parliament, or as the grand inquest of the nation, it is certain that the Commons of England have power to regulate their own procedure, and to control all that takes place within the precincts of their House, and therein to commit for contempts (*Burdett v. Abbott*, *ubi supra*; *Bradlaugh v. Erskine*, 1883, 47 L.T. 618; 31 W.R. 365, Field, J.; *Bradlaugh v. Gossett*, 1884, 12 Q.B.D. 271, Lord Coleridge, L.C.J., Mathew & Stephen, JJ.), and also to commit for breaches of privileges and contempts committed out of doors (*Burdett v. Abbott*, *supra*), as for any attempt or conspiracy to bribe or unduly control the members of the House (*Speaker of Victoria v. Glass*, *ubi supra*); and to institute inquiries and order the attendance of witnesses, and, in case of disobedience, to bring them in custody to the bar for the purpose of examination (*Gossett v. Howard*, 1846, 16 L.J. Q.B. 345, Ex. Ch.). This jurisdiction has at times been put into use with great extravagance (See cases collected in argument of Brougham, *Burdett v. Abbott*, 5 Dow. 185, and in a note to *Stockdale v. Hansard*, 1839, 8 L.J. (N.S.) Q.B., 294, at p. 298). However flagrant the contempt, the House can only commit to the close of the existing session (*Burdett v. Abbott*, *ubi supra*; *Stockdale v. Hansard*, *ubi supra*). If the order, or warrant, sets out that which, on the face of it, either is, or may be, a breach of privilege (that is, a contempt), or if it merely states the party to have been guilty of a contempt, without specifying the nature of it, or the acts constituting it, to set out the order or warrant will be a sufficient return to a *habeas corpus* (*Burdett v. Abbott*, *ubi supra*; *Stockdale v. Hansard*, *ubi supra*; *Gossett v. Howard*, *ubi supra*; *Reg. v. Evans* (*Sheriffs of Middlesex Case*) 1840, 9 L.J. (N.S.) Q.B. 82). If the order, or warrant professed to commit for some matter appearing on the return which could by no reasonable intendment be considered as a contempt of

the House, then it would seem that if the committal were in respect of an act without the House, the Court could, and would be bound to, discharge the prisoner (*Burdett v. Abbott*, *ubi supra*, in the K.B. and Ex. Ch.; *Stockdale v. Hansard*, *ubi supra*; *Reg. v. Evans*, *ubi supra*), but that if the committal were for something done within the House, it is very doubtful if, when once it appeared that the committal was made by the authority of the House, the Court could inquire whether the power was rightly exercised, be the reason assigned ever so startling, for it has been said that to deny to the House the power of deciding effectively and immediately upon the question whether a contempt had been committed in the face of it would be to deny it a power possessed by the humblest Court of Record in the Kingdom (*Bradlaugh v. Erskine*, 1883, 47 L.T. 618, Field, J.), and, however the thing may be as to that (See Art. I., § i.; Note I., *supra*), "no precedent has been or can be produced in which any Court has ever interfered with the internal affairs of either House of Parliament, though the cases are no doubt numerous in which the Courts have declared the limits of their powers outside of their respective Houses" (*Bradlaugh v. Gossett*, 1884, 12 Q.B.D. 271, 286, *per* Stephen, J.). Similarly, the Speaker's warrant, in a matter of contempt, is sufficient protection to the officer of the House properly executing it (*Gossett v. Howard*, *ubi supra*, *Bradlaugh v. Erskine*, *ubi supra*), and an action will not lie against the Serjeant-at-Arms for excluding a member from the House in obedience to a resolution of the House directing him to do so, though the object of the resolution is to restrain the member from doing within the walls of the House an act which he was required by statute to do; nor will the Court grant an injunction to restrain that officer from using necessary force to carry out the order of the House (*Bradlaugh v. Gossett*, 1884, 12 Q.B.D. 271).

Legislative Assemblies other than the Imperial Parliament.

In the earliest case concerning the power of dealing with contempts by local Legislative Assemblies, it was laid down, in an opinion given immediately on the argument, that it is inherent in every assembly that possesses legislative authority to have the power of punishing contempts, whether such as are a direct obstruction to its due course of proceeding, or whether such as have a tendency indirectly to produce obstruction, and that, therefore, the Assembly of Jamaica had power to commit a newspaper publisher for libel as for contempt (*Beaumont v. Barrett*, 1836, 1 Mo. P.C. 59). But later, in a case twice argued, this law was dissented from, and it was said that a local Legislature (as such, and apart from Imperial statute, or from a power in its own constitution which might be shewn by long practice and the acquiescence of the local tribunals, (*Beaumont v. Barrett, sed. qu.*)) had every power reasonably necessary for the proper exercise of its functions, but had not a power to arrest, with a view to adjudication, in respect of a past contempt committed out of doors, as by reproaching a member of the Newfoundland assembly in gross and threatening language on account of words spoken in his place (*Kielley v. Carson*, 1841-2, 4 *ib.* 63). Thereafter it was held that this later case had overruled the earlier, and that a person committed by the Assembly in Van Dieman's Land (Tasmania), for refusing to attend as a witness, or to attend at the Bar, was wrongly committed (*Fenton v. Hampton*, 1858, 11 *ib.* 347); and, by the Court of Queen's Bench, following *Kielley v. Carson*, upon an application for a rule *nisi* for a writ of *Habeas Corpus*, that the House of Keys, in the Isle of Man, has not, as a Legislative body, power to commit as for contempt in respect of a libel out of doors (*In re Brown*, 1864, 33 L.J. Q.B. 193). Subsequently, it has been decided that

a local Assembly has not even the power of committal as for contempt in respect of obstruction in its face, as by insulting and refusing to submit to the ruling of the Speaker of the Lower House of Assembly in Dominica (*Doyle v. Falconer*, 1866, L.R. 1 P.C. 328). In short, the powers incident to or inherent in a local Legislature, without more, are "such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute," and do not extend to justify any punitive action, or power of punishing as for contempt at all, but merely to a power, not in the nature of a judicial power, but rather in the nature of a power probably belonging to every lawfully constituted assemblage discharging functions under the law, to remove obstruction and prevent disturbance by expulsion, or by suspension during the continuance of the current sitting, or, perhaps, until submission or apology (*Ib.*; *Barton v. Taylor*, 1886, 11 App. Cas. 197 (New South Wales). See *Spilsbury v. Micklethwaite*, 1808, 1 Taunt. 146, Lord Mansfield, L.C.J.; *Willis v. Maclachlan*, 1876, 1 Ex. D. 376). If by virtue of an Imperial statute a Colonial Legislature is enabled to enact and does enact that it shall enjoy the privileges and powers of the House of Commons, then it may, as the Legislative Assembly of Victoria, commit a newspaper publisher for a libel on a member, or commit for an attempt to bribe and unduly influence members, and by general warrant (*Dill v. Murphy* (*Case of the Argus*), 1864, 1 Mo. P.C. (N.S.) 487; *Speaker of Victoria v. Glass*, 1871, L.R. 3 P.C. 560), whereas, apart from such a statutory provision, the power and jurisdiction must be set forth and shewn (*Doyle v. Falconer*, *ubi supra*; *Barton v. Taylor*, *ubi supra*).

Note III. to Article IV. Jurisdiction—Persons and Place.

An infant having been taken from his father's control, and removed to France, the father obtained a writ

of *habeas corpus*, which was recognised by the French Judicial authorities and served in France, according to French forms, upon the person in whose custody the infant was. Upon an application for a rule absolute for attachment upon the ground of disobedience to the writ, Patterson, J., held that the only effect the proceedings of the French Tribunal could have upon the service of the writ was to make the service equivalent to personal service, that such proceedings could not increase his jurisdiction, and that he could not grant a rule absolute in the first instance, as the defendant would have a right to be heard before a writ of attachment could go. *Ex parte Wyatt*, 1836, 5 Dowl. P.C. 389. See Art. V.

A native of the U.S.A. was committed for throwing a missile at the Judge in open Court, and subsequently ordered to be discharged on his being placed on board a ship bound for New York. *Re Cosgrave*. Malins, V.C., 16 March, 1877. A. 450, S.C. 22 August, 1877. A. 1717. Seton ii., 1589.

HORACE NELSON.

III.—PRIVATE INTERNATIONAL LAW OF DIVORCE.

ONE of the most complex, though at the same time the most interesting, branches of International Law is the Law of Marriage and Divorce; the rules dealing with the status of husband and wife at the two periods of the creation and the termination of that relation. The principles of the English system governing the latter form the subject of the present discussion. The Private International Law of Divorce, though it has not in England attained to the stage of development which it has reached in the United States of America, has nevertheless received

considerable attention in our Courts, and constitutes a topic well worthy of careful study. The importance of the subject has been enhanced of late years by numerous weighty decisions which involved a full consideration of the principles of Jurisprudence underlying it, and there has sprung up in consequence a marked tendency to assimilate our doctrines with those prevailing generally on the Continent. The anomalies and peculiarities of our system, created even by eminent Judges in the past, are now being abandoned or but feebly defended in favour of more liberal principles. The notions of the indelible allegiance of the English subject, of the indissolubility of a marriage celebrated in England, and the resulting theories of jurisdiction, regarding with jealousy foreign interference, have now but a historical interest, being swept away by a wave of freer and wider thought. One practical outcome of the recent changes will be a progressive step towards that unity of view which it is extremely desirable to attain with respect to the laws governing the most important relations of society, and affecting so materially the public order and well being of a community. It cannot be said, on the one hand, that the English Law of Divorce has arrived at a state of perfection. Several blemishes still exist, which will, no doubt, if the recent tendency may be made a factor of calculation, be removed in the years to come. But, on the other hand, it cannot also be asserted that it is in a crude state, consisting merely of an undigested heap of rules. The truth lies in the middle. Although it may not be possible to reconcile all the decisions with universal principles of International Law, or even with each other, yet we are enabled to deduce from them, with a tolerable amount of certainty, a set of rules which may fairly be said to be an accurate exposition of the English Law. These rules we shall now endeavour to lay down here, and for the purposes of convenience and

clearness they will be expressed in the form of sections, with commentaries subjoined thereto.

I. *Jurisdiction.*

SECTION (I.) GENERAL RULE.

The general rule sanctioned alike by general International Law and by English decisions upon the question of jurisdiction, is that the Court of the country within the limits of which the parties are domiciled at the beginning of the Divorce proceedings, has the exclusive jurisdiction to pronounce a dissolution of the marriage. *Warrender v. Warrender*, 1835, 2 Cl. & F. 488; *Shaw v. Gould*, 1868, L.R. 3 H.L. 55; *Manning v. Manning*, 1871, L.R. 2 P. & D. 223; *Wilson v. Wilson*, 1872, L.R. 2 P. & D. 435; *Firebrace v. Firebrace*, 1878, 4 P.D. 63; *Niboyet v. Niboyet*, 1878, 4 P.D. 1; *Duggan v. Duggan*, 1877, 64 L.T. 152 (Australian); *Harvey v. Farnie*, 1880, 1882, 5 P.D. 153, 6 P.D. 35, 8 App. C. 43.

It is true no English case has expressly laid the law down in the above terms, but the rule has the support of Lord Brougham, Lord Westbury, Lord Penzance, Lord Esher, and Lord Selborne, and other eminent Judges, and very few would now be found to dispute its correctness. Upon the true principle of Private International Law, the "only Court which ought to entertain the question of altering the relation in any respect between parties admitted to be married, or the status of either of such parties arising from their being married, on account of some act, which by law is treated as a matrimonial offence, is a Court of the country in which they are domiciled at the time of the institution of the suit. If this be correct, it follows that the Court must be a Court of the country in which the husband is at the time domiciled, because it is incontestable that the domicile of the wife, so long as she

is a wife, is the domicile which her husband selects for himself, and at the commencement of the suit she is *ex hypothesi* still a wife. The case of an adulterous husband deserting his wife by leaving this domicile, and assuming to domicile himself in another, might seem to raise intolerable injustice, but we cannot help thinking that in such a case, if sued by the wife in the country in which he had left her, he could not be heard to allege that that was not still the place of his married home, that is, for the purposes of that suit, of his domicile." This is the conclusion arrived at by Brett, L.J., in *Niboyet v. Niboyet*, 1878, 4 P.D. 1, 13, 14, and the passage contains a condensed exposition of the whole of English Law on the subject of jurisdiction. In *Warrender v. Warrender*, 1835, 2 Cl. & F. 488, 535, Lord Brougham argued that—"The marriage contract is emphatically one which the parties make with the immediate view to the usual place of their residence; . . . the home where they are to fulfil their mutual promises, and perform those duties which were the object of the union, in a word their domicile:" that the marriage and status of the parties was foreign, and therefore properly subject to the jurisdiction of the foreign Court. We have also the high authority of Lord Westbury on the same side—"But this right to reject a foreign sentence of divorce cannot rest on the principle stated by the Vice-Chancellor, that where by the *lex loci contractus* marriage was indissoluble, it cannot be dissolved by the sentence of any tribunal. Such a principle is at variance with the best established rules of universal jurisprudence. One of these rules certainly is that questions of personal status depend on the law of the actual domicile. This position, that the *universum jus*, that is, the jurisdiction which is complete and ought to be everywhere recognised, does, in all matters touching the personal status of persons, belong to the Judge of that country where the persons are domiciled, has been

generally recognised," citing Rodenburgh. "Boullenois is to the same effect. That this rule is one which is introduced by *ipsa rei natura ac necessitas*, is well illustrated and enforced by Lord Brougham" in the above case. *Shaw v. Gould*, 1868, 3 H.L. 83. And again: "If the domicile of origin may be effectually put off, and a new domicile acquired by persons *sui juris*, it must follow that such persons thereby become to all intents and purposes subject to and entitled to the benefit of the laws and institutions of the adopted country in like manner as they were entitled and subject to the laws of the domicile of origin, and that without becoming aliens in their own native country." *Ib.* Lord Penzance was strongly of opinion that the domicile is the exclusive test. "When that case is reversed, and when the Courts of this country have had to consider how far persons, who are domiciled Englishmen, shall be bound by the decree of a foreign Court, the strong tendency has been to repudiate the power of the foreign Court under such circumstances to dissolve an English marriage. It would be unfortunate if an opposite course should be followed by the Courts of this country when they are determining to what extent they will entertain the matrimonial suits of foreigners." *Manning v. Manning*, 1871, L.R. 2 P. & D. 227. The next year the point arose again, and his Lordship expressed a very decided view: "Whether any residence in this country short of domicile, using that word in its ordinary sense, will give the Court jurisdiction over parties whose domicile is elsewhere, is a question on which the authorities are not consistent. It is the strong inclination of my own opinion, that the only fair and satisfactory rule to adopt on this matter of jurisdiction, is to insist on the parties in all cases referring their matrimonial differences to the Courts of the country in which they are domiciled. Different communities have different views and laws respecting

the matrimonial obligations, and a different estimate of the causes which should justify divorce. It is both just and reasonable, therefore, that the differences of married people should be adjusted in accordance with the laws of the community to which they belong, and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle will preclude the scandal which arises when a man and woman are held to be man and wife in one country, and strangers in another." *Wilson v. Wilson*, 1872, L.R. 2 P. & D. 441, 442. In *Duggan v. Duggan*, 1877, the Supreme Court of Victoria came to the conclusion upon the English decisions that "the result of these decisions appears to be that domicile is necessary to give jurisdiction," and refused to adjudicate upon the petition of a husband domiciled in England, but *bonâ fide* resident in Victoria. Sir James Hannen, in *Firebrace v. Firebrace*, 1878, similarly held that "the domicile of the wife is that of her husband, and her remedy for matrimonial wrongs must be usually sought in the place of that domicile." The judgment of Brett, L.J., in *Niboyet v. Niboyet*, 1878, in favour of the rule, is a masterpiece of lucid reasoning: the arguments adduced are very formidable to meet, and no learned Judge has ever attempted to controvert them. In *Harvey v. Farnie*, 1880-1882, the general principles of International Law were fully discussed before the Courts, and the status theory of divorce upheld. It was held that the proper Court having jurisdiction over matters relating to the status of the married persons, is the *forum domicilii*, and that divorce is an incident of status to be determined by the law of the actual domicile. The Lords Justices in the Court of Appeal, and the Lords in the House, felt the difficulty of reconciling these principles with the judgments of the majority of the Court in *Niboyet v. Niboyet*, 1879, and accordingly spoke with great reserve of that case.

The various grounds judicially adopted in support of the general principle will appear from the following considerations :—

(1.) "A decree of dissolution of marriage cannot be the judicial declaration of a mere consequence agreed between the parties for the breach of a contract or a mere compensation or individual remedy for the breach of a private duty, as in an action for damages ; but it can only be a judicial sentence of the law of the country in and for which the Court is acting, by which such Court assumes to alter not only the relation between the parties, but the status of both. Marriage is the fulfilment of a contract satisfied by the solemnisation of marriage, but marriage, directly it exists, creates by law a relation between the parties and what is called the status of each. That relation between the parties, and that status of each of them with regard to the community which are constituted on marriage, are not imposed or defined by contract or agreement, but by law. The limitations or conditions or effects of such relation and status are different in different countries. As that relation and status are imposed by law, the only law which can impose or define such a relation or status so as to bind an individual is the law to which he is personally subject. The power of a law which enacts restraints on, or grants relaxations of the personal condition of an individual, is territorial, *i.e.*, limited. The meaning of that is, that it is only binding on the natural-born subjects of the law-giver, or over those who have otherwise become his subjects. By the universal comity of nations, foreigners do not, by a mere sojourn in a country, make themselves subject to its personal laws, other than its police or correctional law or laws, expressly enacted to bind all who are in fact within its territorial limits. By the universal independence of nations, each binds by its personal laws its natural-born subjects and all who become its subjects. By the

universal consent of nations, everyone who elects to become domiciled in a country is bound by the laws of that country, so long as he remains domiciled in it, as if he were a natural-born subject of it. It follows, then, from the nature of the subject-matter that laws, which for certain enacted or predicated causes as distinguished from causes agreed on between the parties, alter the personal relation of individuals to one another, or their relation to the community can only bind the natural-born subjects of the enacting country or foreigners who have become domiciled in it; but they may, consistently with principle and the universal consent of nations, bind both of these. The law, then, which enables a Court to decree an alteration in the relation between husband and wife, or an alteration in the status of husband and wife as such, is, as matter of principle, the law of the country to which by birth or domicile they owe obedience. The only Court which can decree by virtue of such law is a Court of that country." Brett, L.J., *Niboyet v. Niboyet*, 1878, 4 P.D. 11, 12; *Shaw v. Gould*, 1868, Westbury, L.R. 3 H.L. 83. Any act done in violation of the duties incident to the status is a matter which concerns the country of the domicile, and the question of divorce is not in any way an incident of contract so as to be governed by the *lex loci*, but an incident of status to be disposed of by the law of the domicile of the parties—that is, of the husband. *Harvey v. Farnie*, 6 P.D. 35, Cotton, L.J.

(2.) "Another mode of considering the subject or another line of argument is this: A judgment or decree determining what is the status of an individual is a judgment or decree *in rem*. It is, therefore, if binding at all, not only a binding judgment as between the parties to the suit, but is to be recognised as binding in all suits and by all parties. Such a judgment, where the jurisdiction of the Court which made it is recognised, is treated as binding and final, not

only by all the Courts of the same country, but by the Courts of all countries. The jurisdiction of the Courts of a country, in which people have elected to be and are, in fact, domiciled, is in all countries admitted, and the judgment or decree *in rem* of the Courts of a country in which people are domiciled is therefore treated as binding in all countries. But the jurisdiction of a country, exercised whether by Legislation or by its Courts over the personal status of the subjects of another country, who are merely present in it, or are merely sojourning in it, or are merely cited to it, is not admitted by the country of which such people are subjects or by other foreign countries. If, therefore, the Courts of any country should assume by a decree of divorce, or any other decree determining the relation or status of a married person, to alter that relation or status of a foreigner not domiciled, the decree would not be recognised as binding by the Courts of any other country. Then the relation or status of a married person would be one in the country of the Court making the decree and another in all other countries. No Court ought to assume or presume to place people in so deplorable a position, unless forced to do so by the express laws of the country whose law it is administering." *Niboyet v. Niboyet*, Brett, L.J., *Ib.*, pp. 12, 13. As to the binding character of a sentence of the domiciliary Court: *vide Cottingham's Case*, 1678, 2 Swanst. 326; *Harvey v. Farnie*, 1880, 5 P.D. 153. As to the suggested mischievous results: *vide Wilson v. Wilson*, 1872, Penzance; *Duggan v. Duggan*, 1877 (Australian).

(3.) "Another general consideration seems to be as follows: The status of marriage is the legal position of the married persons as such in the community, or in relation to the community. Which community is it which is interested in such a relation? None other than the community of which he is a member; that is, the

community within which he is living as a part of it. But that, in fact, is the community in which he is living so as to be one of the families of it ; that is, the community in which he is living at home with the intention that among or in it should be the home of his married life. But that is the place of his domicile. It follows that upon principle the only law which should assume to alter his status as a married person is the law of the country of his domicile. The only Court which should assume to decree such alteration is a Court administering the law of that country. The country or society of his birth is not interested in his marriage status so long as he is domiciled elsewhere." *Niboyet v. Niboyet*, Brett, L.J., *Ib.*, pp. 12, 13.

(4.) "The circumstance of the parties belonging to one country marrying in another presents the question in another light. The marriage contract is emphatically one which the parties make with the immediate view to the usual place of their residence. An Englishman marrying in Turkey contracts a marriage of the English kind, because he is an Englishman and only residing in Turkey, and under the Mahometan law, accidentally and temporarily, and because he marries with a view of being a married man and having a wife in England and for English purposes. Consequently, the incidents and effects, nay, the very nature and essence, must be ascertained by English, not Turkish, law. So an Englishman marrying in Prussia, where incompatibility of temper may dissolve a marriage, as he marries with a view to an English domicile, his contract will be judged by English law. . . . In like manner a domiciled Scotchman may be said to contract not an English but a Scotch marriage. . . . The Scotch parties, looking to the residence and rights in Scotland, may be held to regard the nature and incidents and consequences of the contract

according to the law of that country, their home the home where they are to fulfil their mutual promises and perform those duties which were the objects of their union—in a word, their domicile.” *Warrender v. Warrender*, 1835, *supra*, p. 536, Brougham. “When a marriage has been duly solemnised according to the law of the place of solemnisation, the parties become husband and wife; but when they become husband and wife, what is the character which the wife assumes? She becomes the wife of the foreign husband, in a case where the husband is a foreigner in the country in which the marriage is contracted. She no longer retains any other domicile than his, which she acquires. The marriage is contracted with a view to that matrimonial domicile which results from her placing herself by contract in relation of wife to the husband whom she marries, knowing him to be a foreigner domiciled and contemplating permanent and settled residence abroad. Therefore, it must be within the meaning of such a contract, if we are to enquire into it, that she is to become subject to her husband’s law—subject to it in respect of the consequences of the matrimonial relation and all other consequences depending on the law of his domicile.” *Harvey v. Farnie*, Selborne, L.C., 8 App. C. 50, 51. Accordingly, “the Court, the *forum* of the country of that domicile, is the *forum* which has to determine the status, and has to determine whether the status was originally well created, and whether any circumstances have occurred which justify that *forum* in deciding that the status has come to an end.” *Harvey v. Farnie*, C.A., *per* James, L.J., p. 47.

On the grounds, then, of the nature of the subject-matter of the suit, of the nature of the judgment given in such suit, of the interest of the country in which the dispute arises, of the comity due to other nations, of the immense mischief of a judgment of such a nature being

given under circumstances which will prevent it from being recognised elsewhere, and from the preponderance of English authority, it seems that the only Court which on principle ought to entertain the question of altering the relation in any respect between married parties is a Court of the country in which they are domiciled at the time of the suit, *i.e.*, in which the husband is at the time domiciled, for the domicile of the wife, in law, follows that of the husband.

Having endeavoured to shew that the domicile of the parties is the true criterion of the competence of a Court to decree a divorce, and having quoted the existing Judicial authorities, and stated the grounds in favour of the General Rule, it will now be necessary to consider the value of certain other matters which may arise in connection with the question of Jurisdiction.

(a.) *Character of the Marriage.* The domicile of the parties being alone the foundation of the jurisdiction of a Court to decree a divorce, it follows that the nature or character of the marriage, whether English or foreign, is immaterial. The determination of the quality of a marriage and the distinction between an English and a foreign marriage are wholly independent of the considerations of the political nationality of the parties, being based upon other circumstances. Personal contracts present two main aspects, formal and material. The form of a contract is referred to the place where it was entered into. "Thus, a marriage good by the laws of one country is held good in all others where the question of its validity may arise; for the question must always be, Did the parties intend to contract a marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably be considered otherwise than as intending a marriage contract. The laws of each nation lay down

forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the contract.”—Lord Brougham, *Warrender v. Warrender*, 1835, 2 Cl. & F. 530-31. The material or substantial portion is considered with respect to the country where it is to be acted under, and to receive its execution upon their making the contract. This country may be either the *locus contractus*, or some other place. Most contracts are entered into with a view to the country in which they are made, and in such cases the *lex loci* governs not only the form, but also the matter of the contract. “But the marriage contract, wherever solemnised, is emphatically one which the parties make with the immediate view to the usual place of their residence. An Englishman marrying in Turkey, and under Mahometan law, contracts a marriage of an English kind, because he is an Englishman, and only residing in Turkey and under Mahometan law accidentally and temporarily, and because he marries with a view of being a married man and having a wife in England and for English purposes. In like manner, a domiciled Scotchman may be said to contract not an English, but a Scotch marriage, though the consent wherein it consists may be testified by English solemnities. The Scotch parties looking to residence and rights in Scotland may be held to regard the nature, incidents, and consequences of the contract according to the law of that country—their home . . . where they are to fulfil their mutual promises and perform those duties which were the object of the union—in a word, their domicile. . . . There is fully more reason to suppose they had the law of their own home in their view, where they proposed to live, than the law of the stranger under which they happened for the moment to be.”—*Ibid.*, pp. 535-36. Hence, the words “English marriage” are liable to two constructions—the contract of marriage performed in England is an “English marriage,” and a

marriage performed with a domiciled Englishman* is an "English marriage." A marriage celebrated in England, either between two domiciled foreigners* or between an Englishwoman and a domiciled foreigner is an "English marriage" in point of form, but a "foreign" marriage with respect to its substance. The domicile of the husband at the time of marriage therefore determines the character of a marriage irrespective of his nationality. Usually and properly the term is used to designate the substance and not the form of the marriage. An "English marriage" is, then, a marriage between a domiciled Englishman and a woman (of any domicile) wherever it may have been celebrated (*Warrender v. Warrender*, 1835, 2 Cl. and F. 488; *Geils v. Geils*, 1831-1832, 1 Macq. 255; *Maghee v. McAllister*, 1853, 3 Ir. Ch. 604; *Harvey v. Farnie*, 1882, 8 App. C. 43). It is now well settled by a series of cases, commencing with *Conway v. Beazley*, 1831, and ending with *Harvey v. Farnie*, 1882, that the expression "English marriage" is used in *Lolley's Case*, 1812, in the double sense of a marriage celebrated in England and a marriage between domiciled English people; and though Lord Brougham persistently spoke of the marriage of a domiciled Dane celebrated in England as an "English marriage," and as identical with the expression used by the twelve Judges, it is now well recognised and established to have been an "English marriage" in form only, and one different from the "English marriage" of *Lolley's Case* (*Harvey v. Farnie*, 1880-1882, 5 P.D. 153 6 P.D. 35; 8 App. Cas. 43).

* The expression "*domiciled Englishman*" here signifies a person, whether a British subject or alien, who is domiciled in England; and the term, "*domiciled foreigner*" denotes a person, British or alien, domiciled out of England. Thus a Frenchman or a Scotchman domiciled in England, is a "*domiciled Englishman*" within the meaning of the phrase, while an Englishman domiciled out of England, e.g., in Scotland or France, is a "*domiciled foreigner*."

(b.) *Allegiance of the Parties.* The question of marriage and divorce is a question of civil status, and in England as well as on the Continent generally, civil status, with its attendant rights and consequences, depends not upon nationality but upon domicile alone (*Udny v. Udny*, 1869, 1 H.L. Sc. & Div. 441, 447, Lord Westbury), and hence the nationality of the parties is a fact of no great moment (*vide Shaw v. Gould*, 1868, L.R. 3 H.L., pp. 83 and 85, *per* Lord Westbury; *Niboyet v. Niboyet*, 1878, 4 P.D. 9, Brett, L.J.). In countries, however, where, as in Italy, the civil rights of a person are also made to depend on his political allegiance, the consideration of the nationality of the parties becomes essential in determining the competence of a Court.

(c.) *Locus Contractus.* The effect of the *locus contractus* upon the subject of jurisdiction leads us to the consideration of the proper doctrine which prevails in our Courts with reference to the relation between the *lex loci contractus* and the competence of a Court to dissolve a marriage. Three different views have been advanced by Jurists and adopted in various countries.

(i.) *The "Contractual Theory."* According to this theory marriage is regarded as a contract between the persons. Divorce, then, ought to be a dissolution of the marriage tie upon the conditions agreed on between the contracting parties at the time of the marriage. This view has never been accepted in its entirety by any Christian State, but marriage under this doctrine is treated as determinable only by the public authority and the law of the country of marriage upon the ground that the parties intended that their marriage should be dissoluble or not according to the laws of that country, and on the conditions, if any, recognised by that law; and, hence, it is contended that the jurisdiction to dissolve the marriage belongs exclusively to the *forum contractus*. We have now to discover how far

this theory has prevailed in England. The doctrine may be resolved into two propositions—(a) that a marriage celebrated abroad cannot be dissolved but by a Court of the foreign country; (b) that a marriage in England is indissoluble by a foreign Court. The first proposition has never been recognised in any decision in England. Even before the Act of 1858 it is extremely doubtful if the English Courts would have scrupled to decree a divorce *à mensâ* where the marriage was had in a foreign country, and certainly after the Statute they did not hesitate to grant a divorce, though the marriage took place abroad (*Ratcliff v. Ratcliff*, 1859, 1 Sw. & Tr. 217). It is true that in cases where the foreign Courts had dissolved a marriage celebrated in their own country between persons domiciled in that country, these sentences were regarded as valid here, and some credit was given to the fact of the marriage having been celebrated there (*Ryan v. Ryan*, 1816, 2 Phill. 332; *Argent v. Argent*, 1865, 4 Sw. & Tr. 52); but how far it influenced the learned Judges does not appear: the main consideration being the circumstance of domicile. The second proposition has been generally supposed by writers both in England and America (Story, Wharton) to have been introduced by *Lolley's Case*, 1812, Russ. & Ry. 237, and followed in *Tovey v. Lindsay*, 1813, 1 Dow. 117, and *McCarthy v. De Caix*, 1831, 2 Cl. & F. 568, and only to have been abandoned in 1858 (Dicey), or in 1868 in *Shaw v. Gould*. But the case of *Harvey v. Farnie*, 1880-1882, 5 P.D. 153; 6 P.D. 35, 8 App. C. 48, has now shewn that the Contractual theory had no permanent hold whatever in this country; that it did not originate with *Lolley's Case* and was not adopted by Lord Eldon, but that it arose from a mistaken conception of Lord Brougham as to the point decided in the famous Resolution, and was never seriously entertained by any other Judge in England, and we submit this is correct. *Lolley's Case* is reported in Russ. & Ry. to have decided "that no sentence or Act of any

foreign country or State could dissolve an English marriage *a vinculo* for grounds on which it was not liable to be dissolved *a vinculo* in England." As to this Resolution, it must be noticed in the first place that it does not extend the rule *è converso* to the case of a "foreign marriage," but is limited only to an "English marriage," whatever that might mean; and secondly, that the expression is "an English marriage" and not a "marriage celebrated in England," and hence at best the case is a very doubtful exponent of the Contractual theory. But though no mention is made of any other circumstance as having affected the Judges' opinions, it is certain that the fact of the English domicile of the parties could hardly have been eliminated from their minds, especially as it was known that the domicile regulated the jurisdiction of the foreign Courts (*Cottingham's Case*, 1678, 2 Swanst. 326; *Sinclair v. Sinclair*, 1798, 1 Cons. R. 294). It is extremely reasonable to conclude that the Judges intended their resolution to apply only to the circumstances of the case before them, viz., the domicile of the persons in England from the time of the marriage to the date of the divorce, and the improper resort to Scotland to found jurisdiction for its Courts. This has been pronounced to be the correct view of *Lolley's Case* by the highest authorities in the land in a series of cases from 1831 to 1882 (*Conway v. Beazley*, 1831, 3 Hagg. Eccl. 639; *Warrender v. Warrender*, 1835, *supra*; *Geils v. Geils*, 1852, 1 Macq. 255; *Maghee v. McAllister*, 1853, 3 Ir. Ch. 604; *Robins v. Dolphin*, 1858, 1 Sw. & Tr. 37; *Dolphin v. Robins*, 1859, 7 H.L.C. 390; *Tollemache v. Tollemache*, 1859, 1 Sw. & Tr. 587; *Shaw v. Gould*, 1868, *supra*; *Shaw v. Att.-Gen.* 1870, L.R. 2 P. & D. 156; *Niboyet v. Niboyet*, 1878; *Briggs v. Briggs* 1880, 5 P.D. 163; *Harvey v. Farnie*, 1880-1882), and it must now be considered as conclusively determined. Nay, some subsequent Judges have even thought that *Lolley's Case* decides that an English marriage may be dissolved for the

same grounds as would furnish cause for divorce in England if both parties are *bonâ fide* resident in the foreign country though domiciled in England (*Briggs v. Briggs*, 1880, 5 P.D. 163; *Harvey v. Farnie*, 1880, 5 P.D. 153, *per* Hannen, J.)

During the argument of *Tovey v. Lindsay*, 1813, Lord Eldon did indeed refer to *Lolley's Case* as establishing the doctrine that a marriage celebrated in England was indissoluble in any other way than by an Act of the Legislature. But it seems that Lord Brougham, then counsel, had furnished him with a note of *Lolley's Case*, representing it to have been so decided. However, before giving judgment, Lord Eldon freed himself from the error into which he had been led as to the exact terms of the Resolution, and saw that it was to be understood in connection with the facts of the case, and thus remitted the suit to the Court of Session, on the ground of the husband having acquired an English domicile. In *McCarthy v. De Caix*, 1831, Lord Eldon himself, before whom the appeal was at first discussed, distinctly refused to acknowledge the view that *Lolley's Case* regarded every marriage celebrated in England as indissoluble in any other country. It was only when it was argued a second time before Lord Brougham that the Contractual theory was first introduced into England, and that upon an erroneous construction of *Lolley's Case*. He seems to have misunderstood the point in the Resolution, and converts the words "English marriage," as used by the Judges, into a "marriage in England," and omits the portion of the opinion referring to the ground of divorce. In the same year was decided the case of *Conway v. Beazley*, 3 Hagg. Ecc. R. 639. Dr. Lushington repudiated the notion that *Lolley's Case* and *McCarthy v. De Caix* had determined that a marriage celebrated in England could not be dissolved by a sentence of the Scotch Court, and that the contract remained for ever indissoluble;

holding that it was not the intention of the Judges to lay down such a principle, but that their decision must be limited to the facts that the domicile of the parties was always English, and that the resort to Scotland had been with a view to endow the Scotch Courts with jurisdiction, and even intimating an opinion that if both parties had been *bonâ fide* domiciled in Scotland at the time of the divorce, the decree would have been valid. Lord Brougham, in *Warrender v. Warrender*, took the same view of *Lolley's Case* (*Vide* 2 Cl. & F. 541), and by carrying out the Contractual doctrine to all its logical consequences shewed its absurdity. *Warrender v. Warrender* upheld the jurisdiction of the Scotch Courts in the case of a marriage celebrated in England between a domiciled Scotchman and an Englishwoman, but did not overrule *Lolley's Case*. It was followed by *Geils v. Geils*, 1852, 1 Macq. 255. Lord St. Leonards, who was counsel in *McCarthy v. De Caix*, disapproving of Lord Brougham's decision in that case, said that "the question of the effect of the Danish divorce was not argued; but the Lord Chancellor took up the point, and on the strength of *Lolley's Case* he held that an English marriage could not be dissolved by a Danish Court, and that our law could not recognise a dissolution." *Lolley's Case* itself was explained in accordance with the view of Dr. Lushington. Again, in *Maghee v. McAllister*, 1853, 3 Ir. Ch. 604, where a domiciled Scotchman married in England an Irishwoman, and afterwards, the husband's domicile remaining Scotch, a Court of that country dissolved the marriage, the Irish Chancellor Blackburne held the Scotch divorce to be valid, disagreeing with *McCarthy v. De Caix*. In 1859, two important English cases were decided upon the effect of a Scotch sentence of divorce in England between domiciled English persons—*Tollemache v. Tollemache*, 1 Sw. & Tr. 587, *Dolphin v. Robins*, 7 H.L.C. 390, affirming *Robins v. Dolphin*, 1858, 1 Sw. and

Tr. 37, Cresswell. In *Tollemache v. Tollemache* there was no fraudulent resort to Scotland as in *Dolphin v. Robins*, but in both cases the validity of the Scotch decree was denied on the ground of the domicile of the parties being English at the time of the suit; *Lolley's Case*, as understood in *Conway v. Beazley*, was followed, and the fact of the marriage having been celebrated in England was regarded to be no bar to the dissolution of the English marriage by a foreign Court, provided a proper and *bonâ fide* domicile had first been acquired by the parties in that foreign country. The Contractual principle was again most emphatically rejected by the House of Lords in *Shaw v. Gould*, 1868, L.R. 3 H.L. 55. Kindersley, V.C., having taken the same view of the Resolution of the twelve Judges as Lord Brougham, the House took the opportunity of condemning that view, and pronouncing in favour of the principle that the domicile of the parties and not the *lex loci celebrationis* was the material point in the issue: *Conway v. Beazley*, *Dolphin v. Robins*, being affirmed and followed. Lord Penzance in *Shaw v. Attorney-General*, 1870, adopted the same principle, and again dissented from Lord Brougham. In *Briggs v. Briggs*, 1880, Sir James Hannen even went so far as to hold that an English marriage could be dissolved by a foreign Court, if both parties were *bonâ fide* resident abroad, and the ground of the divorce was one recognised by English Law as sufficient for that purpose. In all the above English cases, however, it must be borne in mind, that the parties were not at the time of the divorce domiciled in the foreign country the Court of which had decreed the divorce, except *McCarthy v. De Caix* (*Warrender v. Warrender*, *Geils v. Geils*, *Maghee v. McAllister* being Scotch and Irish decisions). But in *Harvey v. Farnie*, 1880-1882, that condition was fulfilled. A domiciled Scotchman had married in England an Englishwoman. After some years, the parties retaining

their matrimonial domicile in Scotland, the Courts of that country dissolved the marriage. Against the validity of that decree it was contended that there was "a certain principle which is peculiar to the Law of England; that principle is neither more nor less than this, that whenever a marriage takes place in England between a foreigner and an English lady, the Law of England regards the place of celebration as determining the status of the parties from that of married to that of single persons. For that proposition no authority has been cited, either concurrent with, or subsequent to long series of decisions to which I have alluded. But it is said that it was so settled in *Lolley's Case*, approved of in *Tovey v. Lindsay*, and followed in *McCarthy v. De Caix*,"—Lord Watson, 8 App. C. 62. Then his Lordship shews the contention to be wrong. This very important case has dealt a final death blow to a doctrine already discredited in every case from *Conway v. Beazley*, 1831, to the present one. The shade of Lolley may now rest in peace, as it is not likely in the future to be disturbed again. *Lolley's Case* must now, without the possibility of a doubt or dispute, be held as deciding merely that no foreign divorce will be considered as valid when the parties are domiciled in England at the time of the divorce, and when they have resorted to the foreign country only to give its Courts jurisdiction over them. *Tovey v. Lindsay* is explained conformably to this view, and *McCarthy v. De Caix* has been overruled; while *Warrender v. Warrender*, *Geils v. Geils*, *Maghee v. McAllister* have been pronounced undistinguishable and affirmed. *Harvey v. Farnie* has been followed in *Scott v. Attorney-General*, 1886, 11 P.D. 128 (Irish or, which is the same thing, English marriage): *Turner v. Thompson*, 1888, 13 P.D. 37 (American marriage celebrated in England).

The old view as to the extent of the prevalence in England of the Contractual dogma cannot now be maintained.

Harvey v. Farnie has shewn first that that doctrine was not established in *Lolley's Case*, nor in the end entertained by Lord Eldon; but arose from a mistaken view of Lord Brougham, though how the error crept into his mind is not certain; and, secondly, that the theory has never met with any recognition from *Conway v. Beazley*, 1831, to the present time, but that on the contrary it has always been discarded. It is very probable that the Contractual view of marriage never had a strong hold upon the English Judicial mind, though it would appear that a vague feeling lingered till recent times (in fact, till *Harvey v. Farnie*) that the place of marriage might have something to do with the question of the jurisdiction of a Court to grant a dissolution accordingly. That fact has been mentioned both with respect to the jurisdiction of the English Court to dissolve a marriage in England (*Bond v. Bond*, 1860, 2 Sw. and Tr. 93; *Santo Teodoro v. Santo Teodoro*, 1879, 5 P.D. 79; *Simonin v. Maillac*, 1860, 2 Sw. & Tr. 67), and with reference to the jurisdiction of a foreign Court to dissolve a marriage celebrated in England (*Birt v. Boutinez*, 1868, L.R. P. & D. 487; *Collis v. Hector*, 1875, L.R. 19 Eq. 334); or in the country a Court of which has pronounced a decree (*Ryan v. Ryan*, 1816, 2 Phill. 332; *Argent v. Argent*, 1865, 4 Sw. & Tr. 52; *vide also Ingham v. Sachs*, 1886, 56 L.T. 920), or in a third country (*Connelly v. Connelly*, 1851, 7 Mo. P.C. 438.) It seems apparently that this undefined undercurrent of opinion was due to the fact that *McCarthy v. De Caix*, though continually dissented from by the most eminent Judges, yet stood as an existing decision that the place of the marriage regulated the question of jurisdiction, and was not expressly overruled in any English case till *Harvey v. Farnie*.

The doctrine regarding marriage as a mere contract or agreement between the parties, and divorce as a rescission of it, has been shewn to be wrong by Lord Penzance in a

singular case (*Mordaunt v. Mordaunt*, L.R. 2 P. & M. 103, 126), and by Brett, L.J., in *Niboyet v. Niboyet*, 1878-79, 4 P.D. 1, and the absurd consequences flowing from carrying the theory to its ultimate results were pointed out long ago. *Warrender v. Warrender*, 1835; *Shaw v. Gould*, 1868.

(ii.) *The Penal Doctrine.* This view is opposed to the preceding position, divorce being regarded as a punishment for a criminal offence. The jurisdiction of a Court to pronounce a sentence of dissolution is, as in other criminal cases, sufficiently founded by the residence of the parties apart from their domicile, and by the commission of the offence within the country to which the Court belongs. Marriage imposes on the parties duties, in the observance of which the State is so much interested, that a breach thereof is visited by criminal punishment, and hence the fact of the marriage having taken place abroad is immaterial. This principle was adopted by the Scotch Courts in *Allerton v. Taosh*, Ferg., M. & D. 1; and followed in *Duntze v. Levett*, *Idem*, 68; *Edmonstone v. Lockhart*, *Id.*, 168; *Butler v. Forbes*, *Id.*, 209; *Kibblewhite v. Rowlands*, *Id.*, 226; *Gordon v. Pye*, *Id.*, 276. *Vide also Ringer v. Churchill*, 2 D. 307; *Jack v. Jack*, 24 D. 467. By the law of England adultery, though a grievous sin, is not a crime, and the analogies and precedents of Criminal Law have no authority in the Divorce Court, a Civil tribunal. A divorce is not a criminal proceeding. *Mordaunt v. Moncrieffe*, 1 H.L., Sc. & Div. 374. Much of the arguments of Lords Justices Cotton and James in *Niboyet v. Niboyet*, however, seems to point in this direction, and upon this ground, *inter alia*, the propriety of the decision there may be questioned.

(iii.) *The Status Doctrine.* This is the theory generally accepted in England, America, and on the Continent. Its best expositors in English law are Lord Westbury, in *Shaw v. Gould*, and Brett, L.J., in *Niboyet v. Niboyet*. "Marriage is

the fulfilment of a contract satisfied by the solemnization of marriage; but marriage, directly it exists, creates by law a relation between the parties and what is called their status; that relation between the parties, and that status of each of them, with regard to the community, which are constituted on marriage, are not imposed or defined by contract or agreement, but by law." 4 P.D. 11. The question of divorce is not an incident of the marriage contract to be governed by the *lex loci contractûs*, but is an incident of status to be disposed of by the law of the domicile of the parties. *Harvey v. Farnie*, 1880, 6 P.D. 35. According to this theory, the Court of the actual domicile alone (or of their own State, where, as in Italy, the civil rights of a person are dependent on his political nationality) has the jurisdiction to dissolve a marriage wherever solemnized. The dissolubility or indissolubility of a marriage must therefore be determined by the law of the existing domicile at the time of the proceedings (*Warrender v. Warrender*, 1835; *Shaw v. Gould*, 1868; *Manning v. Manning*, 1871; *Le Sueur v. Le Sueur*, 1876), and any and what interference with the status of husband and wife, whether divorce, judicial separation, or restitution of conjugal rights, falls within the exclusive province of the domiciliary Judge (*Firebrace v. Firebrace*, 1878, 4 P.D. 63; *Niboyet v. Niboyet*, 1878, 4 P.D. 1; Brett, L.J., *Turner v. Thompson*, 1888, 13 P.D. 37).

(d.) *Grounds of Divorce.* Divorce being in the nature of a remedy, the various grounds on which it can be granted must depend on the *lex fori* of the Court which, at the beginning of the suit, has the proper jurisdiction, viz., the Court of the present domicile. In *Lolley's Case* the Scotch Courts dissolved the English marriage on the ground of the husband's adultery, a circumstance insufficient by the law of England to entitle a wife to divorce, and this point was mentioned in the judgment. *McCarthy v. De Caix*, 1835, proceeded on the theory that the competent Court

was the Court of the *locus contractus*, and accordingly rejected the Danish divorce for incompatibility of temper. But this case was never followed, and has recently been definitely overruled, and it is now settled that the *forum domicilii* must decide the question as to what acts and violations will constitute good grounds of divorce. Divorce being an incident of status, it follows that "an Englishman marrying in Prussia, where incompatible tempers may dissolve a marriage, as he marries with a view to the English domicile, his contract will be judged by English law, and he cannot apply for a divorce here on the ground of incompatible tempers." *Warrender v. Warrender*, 1835, Brougham, L.C., 2 Cl. & F. 535. Again, "Suppose now two Roman Catholics, who, having married in Spain, afterwards become Protestants, and are *bonâ fide* domiciled in England, could it be held that the husband is barred by the *lex loci* from seeking a divorce here from his wife by reason of her adultery? On the other hand, suppose two Prussian subjects married in Berlin, where a divorce may be obtained for incompatibility of temper, could they, on becoming domiciled in England, claim a divorce on such a ground before the tribunals of this country, where such a ground is not recognised?" *Shaw v. Gould*, 1868, 3 H.L. 84, Westbury, L.C. The first proposition of Lord Westbury's dictum is illustrated in *Le Sueur v. Le Sueur*, 1876, where the marriage was indissoluble by the law of Jersey, their matrimonial domicile. The English Court did not grant a divorce, as the husband was not domiciled in England, but the indissolubility under the law of Jersey would have been no bar to a dissolution here if the parties had had an English domicile, having abandoned the Jersey one. In *Manning v. Manning*, 1871, the husband petitioned for a judicial separation for the desertion of his wife for two years, which was not a matrimonial offence by the law of

Ireland, and the Court held that if the English Court had had jurisdiction the divorce would have followed such desertion, being a ground of divorce here. *Wilson v. Wilson*, 1872, is an instance of the second example of Lord Westbury. Whatever be the grounds which would furnish a divorce in the matrimonial domicile, the status of the parties upon a subsequent change falls to be governed by the *lex fori* of the new domicile, and the marriage can be dissolved only for grounds known to the latter law. "From all these considerations, it seems the only Court which on principle ought to entertain the question of altering the relation in any respect between the parties admitted to be married, or status of either of such parties arising from their being married, *on account of some act which by law is treated as a matrimonial offence*, is a Court of the country in which they are domiciled at the time of institution of the suit." Brett, L.J., *Niboyet v. Niboyet*, 1878, 4 P.D. 14. "Where, as in this case, the divorce is decreed by the Court of the country where the parties were domiciled, we have nothing to do with the grounds on which the tribunals of that country may proceed in declaring what shall entitle the man and woman to have his or her marriage dissolved." Hannen, P., *Harvey v. Farnie*, 5 P.D. 155. "Any act done in violation of the duties incident to the status is a matter which concerns the country of the domicile." Cotton, L.J., 6 P.D. 49. In *Harris-Gastrell v. Harris-Gastrell*, 1890 (*Times*, 16th June, 1890), an unreported case, the Wiesbaden Court dissolved an English marriage upon the petition of the husband for "malicious desertion" on the part of his wife. Mathew, J., is reported to have told the jury that if the parties were *bonâ fide* domiciled at Wiesbaden, the Court would have the authority to dissolve the marriage for malicious desertion.

After these general remarks we shall proceed to deal with the application of them to the various circumstances in which

questions involving these principles may arise in the Courts for solution. The subject will naturally fall to be divided into two branches—(A.) English Divorce; (B.) Foreign Divorce.

E. H. MONNIER.

IV.—CURRENT NOTES ON INTERNATIONAL LAW.

Chili and the Diplomatic Right of Asylum.

AS was anticipated, the Congressionalists have proved victorious. The new Government has been generally recognised even by States which previously hesitated to recognise the "rebels" as belligerents. Balmaceda has died by his own hand, and those of his followers who were not killed in battle have had to seek asylum in European men-of-war, or under the ægis of Ambassadorial privilege.

The United States Minister, Mr. Patrick Egan, has specially distinguished himself in affording protection to the fugitive Balmacedists, much to the chagrin of the victorious party.*

The rule of International Law as to the right of protection and asylum by Diplomatic agents is not very well defined. It would seem clear that "it is a practice which, from the necessity of the case, is exercised to a greater or less extent by every civilised State in regard to *barbarous or semi-barbarous countries*."† Owing to the chronic revolutionary condition of the South American Republics, most European States have at times been compelled to include them for this particular purpose in the class of countries mentioned.

* See *Times*, 7th October, 1891.

† See Mr. Secretary Seward's Note, 1868, Wharton's *Digest*, § 104.

It is another curious illustration, however, of the lack of uniformity between the protestations and practice of the U.S. Government that its Minister in Chili should have been the readiest to afford such indiscriminate protection to the members of the late Government. In the well-known Haytian Case in 1875, the U.S. Government deprecated the action of its representative in these words: "It is regretted that you deemed yourself justified by an impulse of humanity to grant such an asylum. You have repeatedly been instructed that such a practice has no basis in public law, and, so far as this Government is concerned, is believed to be contrary to sound policy."*

So recently as 1885, Mr. Bayard, then Secretary of State, said, "The Government of the United States does not claim for its legations abroad any extra-territorial privileges of asylum," and this principle is confirmed by the Printed Personal Instructions issued to U.S. Diplomatic agents.

There is no reasonable doubt that if a Minister chooses to grant asylum to refugees, the foreign State has no right forcibly to arrest the latter in the Embassy.† The new Government of Chili has expressly recognised this.‡

* Wharton's *Digest*, § 104.

† There was a curious case in 1726, when the Duke of Ripperda, Minister of Philip II., took refuge in the Hotel of the British Ambassador at Madrid, and was taken away by force, and without any subsequent protest by the British Government. See Wharton's *Digest*, § 104. [The statement of the view taken by the British Government of the Ripperda case, put forth by Mr. Secretary Bayard, and printed by Wharton, *loc. cit.*, does not appear to agree with the facts, as stated by Phillimore, *Comm. upon Int. Law*, 3rd Ed., III., p. 90, where it is mentioned that "the English Ambassador resented the act as a violation of ambassadorial privileges, and while sharp remonstrances were passing between the two Courts, an English fleet arrived in the Spanish waters." As a matter of fact, a very curious position of affairs ensued between Great Britain and Spain, during which hostile manifestations took place, and the attitude of Spain was described in a Speech from the Throne as little short of a Declaration of War.—Ed.]

‡ See especially *Times*, 14th September, 1891.

It would seem to be a good ground, however, in many cases, to demand the recall of the Minister.*

In connection with another matter it may be noted that the *Itata* has been released by the U.S. Court upon a bond being given for a penalty of \$120,000†, and still more recently the proceedings have been dismissed as against all parties concerned.‡

J. M. GOVER.

Quarterly Notes.

Law at the International Congresses, London, 1891.

As we noted in our August number, by anticipation, Law, as an allied subject to the subject-matter proper of each of the three International Congresses which have marked the Autumn of this year in London, has been exceptionally in the forefront.

At the International Congress of Hygiene and Demography, Mr. Gainsford Bruce, Q.C., M.P., and our own contributor, Mr. Rutherford, of the Middle Temple, dealt with questions of importance in Sanitary Legislation, while the Law and Practice of Quarantine, as affecting some of our principal Colonies, formed the topic of Papers by Delegates representing Canada and Australia, as well as England and the Continent. At the International Congress of Orientalists, as we see by the specially interesting Congress number for October of the *Asiatic Quarterly Review* (Oriental University Institute, Woking), Law and Administration in the French Colonies and Protectorates of the Far East, and Mohammedan Law in Algeria

* [Since these pages were in type; we learn from the *Morning Post*, October 21st, 1891, that the U.S. Government has recognised the right of asylum involved in the recent action of its Minister. This seems to bear the aspect of a new departure on the part of the U.S.A. It should be noted that the Spanish and Argentine Diplomatic Representatives acted in the same manner as Mr. Egan.—Ed.]

† *Times*, 7th October, 1891.

‡ *Times*, 4th November, 1891.

and Tunisia, were dealt with by Mr. C. H. E. Carmichael, M.A., one of the Sectional Secretaries, while M. Pret discussed the Modern Legislation of Japan from an Ethnographical point of view. At the International Folk-Lore Congress, the Presidential Address in the Section of Institutions, from the learned pen of Sir Frederick Pollock, Bart., brought out the points of contact between the investigations carried on under the name of Folk-Lore and the researches of such Jurists as the late Sir Henry Maine and others, while Papers, such as that read by Dr. Winternitz, in the Institutions Section, on Indo-European Customs, with special reference to Marriage Customs, set this important fact in still higher relief. When the *Transactions* of the respective Congresses are before us, we shall hope to return to these considerations in greater detail.

Reviews.

Journal du Droit International Privé. Edited by EDOUARD CLUNET, Advocate at the Court of Appeal. Paris: Marchal et Billard. 1891.

The latest issues of this old friend and contemporary of ours are full of varied and interesting matter. The Part Nos. VII.-X., for the current year, offers us a mass of intellectual food from which we can only at present spare the space to mention briefly that it contains contributions on Private International Law in Bosnia and Herzegovina, by M. Geneste, on Political crimes and offences (délits) and allied infractions, with reference to recent Extradition Questions, by M. Lenepveu de la Font, and one of a series on Foreigners before the Consular and Local Courts in Turkey, by M. Salem, Advocate at Salonica. Among minor notes we have some dealing with recent events in Alsace-Lorraine, Chili, Switzerland, and elsewhere, bearing upon International Law, the phrase *Droit International Privé* being taken by our valued friend, M. Clunet, in the widest sense possible, including much which is generally assigned to the Public Law of Nations.

* * * *Pressure on our space obliges us to hold over much matter in hand.*—ED.

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I.—A NEW DEPARTURE IN THE LAW OF BAILMENTS.

(*THE COUPÉ CO. v. MADDICK.*)

THE case of *The Coupé Co. v. Maddick** is interesting on several grounds. The learned Judges who decided it (Mr. Justice Cave and Mr. Justice Charles) were of opinion that "no case in point can be found on either side of the question"; they were, therefore, constrained to do what learned Judges do not very frequently do—at least in reported cases—viz., decide the point before them on "general considerations," so that students of the Law, who turn to the report of the case, have the opportunity of revelling in a conjuncture of what to any true student must be rare and fascinating treats—a fresh presentment of facts and a novel elucidation of principles arising in a single short case. Besides, there is the general interest of the problem, which is not a little enhanced by its solution at the hands of the learned Judges; to say nothing of the practical and general importance of the points on which the decision turns.

A short time may, therefore, it is fair to assume, not unprofitably be spent in considering this case.

The Coupé Company brought an action in the Bloomsbury County Court, to recover damages from the defendant for injuries to a carriage and horse hired from them by the

* L.R. [1891] 2 Q.B. 413.

defendant, which injuries were caused by the act of the defendant's coachman, who, instead of taking the horse and carriage back to the stable as he was ordered to do, after having driven his master, the defendant, home, for his own purposes started on an entirely new and independent journey, which had nothing to do with his employment; in the course of which the horse and carriage were injured.

The County Court Judge held that the hirer was not responsible, on the authority of *Storey v. Ashton*.* His decision was reversed by Cave and Charles, J.J., on two grounds; (1) that the owner could maintain no action against the servant for breach of duty in the wrongful and negligent use of the horse and carriage, by which they were damaged; "because . . . there was no invasion by the servant of the latter's (the owner's) right of ownership, and no contractual relation between them," and (2) "on general principles of the public benefit." These grounds I propose to examine in order.

I. The reasoning on which the first is supported is as followst:—"If the horse and carriage had got safely back to the stables, the act of the servant would not have been tortious against the owner of the horse and carriage." This is clearly correct as a statement of the law in a case that did *not* happen; but, so far as the present discussion is concerned, is clearly irrelevant, since the point of the present case is that the horse and carriage did not get safely back to the stables; and the action was brought *because* they did not get safely back, but were damaged through the wrong-doing of him who took them out. To reason from one case to another where the *differentia* between the two is the very thing to be accounted for is not a process that promises a satisfactory conclusion. The

* L.R. 4 Q.B. 476.

† L.R. [1891] 2 Q.B., at p. 416.

differentia, it is plain, must be subject to its own laws, and is not governed by principles common to the two cases.

However, to proceed with the reasoning of the learned Judges; from the proposition that, had no damage accrued from the misuse of the horse and carriage, the reversioner would have had no action, the Court proceeded to the further propositions—"nor could the fact that the horse and carriage were injured during the journey give the owner a cause of action against the servant, because it was not the owner who had entrusted the horse and carriage to the servant, but the hirer, his master, and, consequently, the duty of the servant to take care of them was a duty arising out of the relationship of master and servant, and owing to the master, and was not a duty owing to the owner, because there was no contractual relationship between the servant and the owner."

This statement seems immediately to involve the following assumptions:—

(1.) That the fact of injury, in the circumstances set out, could not give the owner an action against the hirer's servant (because, apparently, as has been before noted in the same circumstances, where there is no injury there can be no action).

(2.) That the entrusting the horse and carriage by the owner to the hirer in any case disentitled the owner from suing the servant of the hirer in respect of damage done by him.

(3.) That, in the circumstances set out, no duty on the part of the hirer's servant to the owner did or could arise with respect to the things bailed.

All three of these assumptions, it is submitted, are devoid of foundation, for they all proceed on a further and more remote assumption, that an action for conversion is the only action possible in the case, and that, since the right to the immediate possession of the goods is in the

hirer, an action for conversion would not be maintainable. The minor proposition appears to be unassailable. The major, however—that conversion is the only action available—is far from being either clear or even plausible.

To substantiate this position of the *primâ facie* difficulty in assenting to the postulate of the learned Judges a quotation from *Bullen and Leake on Pleading* (3rd Ed., p. 395) may suffice. It is there said: "The owner of a future or reversionary interest in goods cannot in general sue as for a conversion of them, but must sue specially on the case in respect of the injury to his reversionary interest." Therefore, if injury to owner's reversionary interest is shewn, he may have an action against the wrongdoer, even though the present right to the possession of the goods was in a third person.

But for the determination whether the present is a case in which any such action lies two points become material. Firstly, is the present one of the cases where, though trover will not lie, there is another remedy; and secondly, if it is, is any, and if any, what difference of principle worked by the injurious person occupying the position of servant to the bailee?

Is the present case one in which an action lies, admitting that the action in trover is inapplicable?

So long ago as the year 1473, according to Rolle,* the law was laid down as follows:—

1. *Si jeo bail biens al A. que eux bail a B. a garder al use de A. et B. eux gastée jeo poy aver action sur le case vers B. coment que je ne eux bail a luy.* 12 E. 4, 13. 2. *Si jeo bail mon chival al un Ferror de Ferre et il ceo bail al auter Ferror qui ceo encloy, jeo poy aver action sur le case vers luy*

* *Abridg.* Action sur case O. See 1 Black. Com. 431, where the view attributed to Brian is adopted. The correctness of this view is, however, questioned by Coleridge in a note to this passage in his edition of Blackstone. See also Paley, *Principal and Agent* (Lloyd's Edit.), 398.

coment que jeo ne bail le chival a luy. Contra 12 E. 4, 13, *per* Brian. While, what is perhaps more to the point, so late as the year 1862 it was laid down broadly by the Court of Common Pleas,* that the owner of a chattel, *e.g.*, a barge, which is on hire for an unexpired term, may maintain an action against a third person for a "permanent injury"† thereto.

An extract or two from the judgments of the distinguished Judges who were parties to this decision may be useful as pointing its full force. Thus Erle, C.J., said: "The question is whether the owner of the barge has a right to maintain an action for that injury. In my opinion, he has that right, the mere temporary outstanding interest in the hirer of the barge amounting to nothing. That trover will not lie for the conversion of a chattel out on loan is clear. *Gordon v. Harper*, 7 T.R. 9. But in *Tancred v. Allgood*, 4 H. & N. 438, it was, by implication, held that an action for a permanent injury done to a chattel, whilst the owner's right to the possession is suspended, may be maintained." Williams, J., added: "It is fully established that in the case of a bailment not for reward, either the bailor or the bailee may bring an action for an injury to the thing bailed; but in the case of a hiring, the owner cannot bring trover, because he has temporarily parted with the possession. It seems to me, however, to be clear that, although the owner cannot bring an action where there has been no permanent injury to the chattel, it has never been doubted that where there is a permanent injury the owner may maintain an action against the person whose wrongful act has caused the injury."

* *Mears v. The London and South Western R. Co.*, 11 C.B. N.S. 850.

† What constitutes "permanent injury" is explained in *Mumford v. Oxford, Worcester, and Wolverhampton R. Co.*, 1 H. & N. 34, and it obviously covers the present case.

This case has not only never been questioned, but is referred to in the text-books as the leading authority for the propositions it embodies, and is particularly referred to in Mr. Justice Cave's edition of *Addison on Torts*, at p. 481, as establishing the propositions for which it is now vouched, viz., that the absence of a right to the immediate possession of goods is not conclusive against the owner's right of action in respect of injury done to them; but that such owner may maintain an action against a wrongdoer, who, by negligence or misconduct, has caused the goods to be permanently injured. To obviate a possible objection, the case of a servant not undertaking business allotted to him by his master must be here noticed. The subject will be alluded to more at length later on. Here it is sufficient to point out that, though a possible ambiguity in the use of such words as "causing an injury," or the like, may suggest an exception to the principle stated, yet, in fact, two different things are meant. In the case now being considered the act causing the injury is either doing inefficiently, or refraining from doing, something in respect of which there is a legal duty to do it efficiently. In the case indicated, the injury is caused by failure to do something in respect of which there is no legal duty to act at all on the part of the person so refraining with reference to the person injured by the omission to enter on the business; though the person so failing to act has contractually bound himself with reference to a third person, and is thus liable to him on his contract, while wholly free from any duty to the person actually injured by his abstention.

Had, then, the servant, whose act caused the injury to the horse and carriage of the Coupé Co., been a stranger to, and not a servant of, the defendant Maddick, there is overwhelming authority for the conclusion that, despite the want of right to immediate possession, the Coupé Co.

would, in the circumstances, have had a right of action against such stranger. But, further, on the same assumption, they would not have had an action against the defendant Maddick in addition to their right of action against the stranger; that is, the defendant, on the assumption we are now discussing, would be under no liability at all. For the hirer is not a warrantor, and is thus only liable where he has been negligent; and on the hypothesis we are now considering, the injury here being the wilful act of a stranger, would not, in the absence of conduct of his inducing it, be attributable to the hirer.

But it may be convenient at this stage to consider somewhat more at length what amount of care the Law requires under a contract of hiring. The *locus classicus* is the Judgment of Holt, C.J., in *Coggs v. Bernard*.^{*} As specifying the amount of care required from the hirer of goods, Holt, C.J., quotes the *Institutes*,[†] as follows:—*Talis ab eo desideratur custodia, qualem diligentissimus paterfamilias suis rebus adhibet, qualem si præstiterit et rem aliquo casu amiserit, ad rem restituendam non tenebitur.* On this passage he comments thus:—"From whence it appears that, if goods are let out for a reward, the hirer is bound to the utmost diligence, such as the most diligent father of a family uses; and if he uses that he shall be discharged. But every man how diligent soever he be, being liable to the accident of robbers, though a diligent man is not so liable as a careless man, shall not be answerable in this case if the goods are stolen."

Sir William Jones, however,[‡] shews that "*diligentissimus*," as used in the passage from Justinian, signifies not "extreme" but "ordinary" diligence. Pothier § before him had expressed the same opinion, and Story,^{||} referring

^{*} Lord Raymond, 909.

[†] *Inst.* III., 26, 5.

[‡] *Bailments*, § 87.

§ *Contrat de Louage*, n. 192.

^{||} *Bailments*, § 398.

to Sir William Jones, says "his opinion appears now to be settled upon principle to be the true exposition of the Common Law." Chancellor Kent * takes the same view. Further, the opinion of Holt, C.J., was not followed by Lord Ellenborough in *Dean v. Keate*,† and the learned reporter, himself afterwards Chief Justice and Chancellor, after setting out the above-quoted passage from the Judgment of Holt, C.J., and referring to a circuit case where it was not followed, concludes a note with the following expression of his own opinion:—"According to this doctrine, he (the defendant) would be answerable for slight negligence. But on a review of all the authorities upon the subject it will be found that this extraordinary care is required only of a borrower; and that upon the true construction of the contract of *locatio conductio rei* the hirer is required to use no more than that degree of diligence which *prudent men*, that is the *generality of men*, use in keeping *their own goods*."‡

In this case, then, we may conclude that the hirer's obligation was limited to the use of "that degree of diligence which *prudent men*, that is the *generality of men*, use in keeping their own goods." But on the assumption upon which we have so far gone—that the injury inflicted was the act of a stranger who converted § the horse and carriage to his own use, and whilst in possession of them caused the injury—there is no absence of the required degree of care even alleged. The negligence for which the learned Judges hold the defendant responsible is the act or series of acts producing the injury, and not any antecedent want of care in the custody of the horse and carriage—the

* 2 Kent, *Comm.*, sects. 40, 586.

† 3 Campb., 4.

‡ See also *Eastman v. Sanborn*, 85 Mass., 594.

§ Conversion is defined to be: A wrongful interference with goods, as by taking, using, or destroying them, inconsistent with the owner's right of possession.—*Fouldes v. Willoughby*, 8 M. & W. 540.

negligence is not negligence in the general arrangements, but in the special acts done by the hand producing the injury. If, then, that hand is a stranger's, there is no liability on the hirer. Supposing even a higher degree of care is required—any degree, in fact, short of an absolute warranty—the decision is not helped, for no negligence is alleged other than that of the servant.

But, secondly, if the law is in accordance with the conclusion so far arrived at, is any difference of principle worked by the injurious person occupying the position of servant to the hirer?

At the outset it is manifest that if the hirer had knowingly employed an incompetent servant, or had not exercised due care in the selection of a servant, he would be liable for the consequences of those acts which he put it in the power of a servant to do. But in this case there is no allegation of any such breach of duty. The point is not that the master did not take care to select a competent servant, but that having selected a servant, that servant caused damage for which the master is liable.

The contract of the hirer being, as we have already seen, to use "ordinary" diligence, or, to quote once more Lord Campbell's expression, "that degree of diligence which *prudent men*, that is the *generality of men*, use in keeping *their own goods*," the question arises whether thereby the hirer engages for all the acts of his servants, or only for those within the scope of their employment.

As a general proposition of the Law of Agency, it is too clear to need any argument on the point that the principal is only liable for those acts of his agents which are within the scope of the agents' authority. Granted that principle, the doctrine asserted by the learned Judges in this case is in the nature of an exception to the general rule for the benefit of letters to hire. But by the very terms of the judgment of the learned Judges, no authority for their

proposition exists ; for as " no case in point can be found on either side of the question,"* they were constrained to decide on the " general considerations " now being examined.

But why an exception should be devised for the case, unless on the ground of that " public benefit " which is presently to be considered, does not seem at all obvious.

To arrive at a solution of what exactly is the obligation the hirer enters into with the owner—the letter—with regard to the acts of his servant, the terms of the contract which the Law presumes—for in this case there were no special terms proved—require to be definitely stated. To maintain the position of the learned Judges the contract should be that the bailee, the hirer, engages to keep the thing bailed, either by himself or his servant, and to be responsible for any act of either, whereby the thing bailed is injured, irrespectively of any question of scope of authority. But if this is the contract, there should, at least, be some evidence that it is ; or some authority suggesting that the Law implies it. As a fact there is none—not a vestige.

If, on the other hand, the principle adopted by Story, and the other authorities who have been quoted, is " the true exposition of the Common Law," then the hirer is required " to use no more than that degree of diligence which prudent men, that is the generality of men, use in keeping their own goods." The ordinary customs of the country and the usual course of business, so far as they are applicable, cannot be rejected from consideration in the determination of any contract. Now, no surgeon, contracting with a job-master for the use of horse and carriage, can be presumed to undertake personally to feed the horse and

* If it were not for the distinct assertion of the learned Judges, reference might have been suggested to *Coleman v. Riches*, 16 C.B. 104, and the whole cloud of cases and *dicta* to be found there.

clean the carriage, or to sit ever on guard to prevent molestation of the things he has hired. When he has provided a competent servant to take care of them and sufficient and suitable accommodation, and has used proper supervision, in the contemplation of the ordinary unskilled man, he has done all that can reasonably be expected of him; and in the case of the *Coupe Co. v. Maddick* it must not be lost sight of that there was no dispute but that all these duties had been performed.

If, then, there is no warranty of the servant, and the existence of a warranty is inconsistent with what we have seen to be the duty of the hirer to the letter—the owner—there must be certain classes of acts done by the servants for which the master would not be liable. If a bailee's servant engaged, say, in quite another department of work, but necessarily having opportunity of injuring the bailor's goods through his access to the bailee's establishment, were deliberately, and with the object of injuring the article bailed, to do some malicious act which destroyed it, probably the two learned Judges would hold without hesitation that the master was not liable for the act *quà* act; though the master might be liable, if any laxity of his had given opportunity for the wrongful act being done. At any rate, the authority in favour of such a view is continuous and overpowering. In such a case the liability of the master for the act of the servant would be no greater than for the act of a stranger; because the act is really not that of a servant, but of a stranger. The servant, in what he does, is acting on his own account, and in no sort of way for his master. But vary the circumstances, by supposing the servant so acting to be not engaged in another branch of service, but to have the actual charge of the article which he injures. The same considerations that exonerated the master in the former case continue to operate in this. There is no distinction in principle between them. If this

be so, there must be some line capable of discriminating the cases of liability from those of absence of liability.

Story* very clearly indicates what he considers this line to be. He says: "The master is not universally liable for the misdeeds of his servants; and, therefore, we are to distinguish whether the act complained of has been done in the service of the master, or in obedience to his orders, or not; for in the former case only is the master responsible. The master is not responsible for any wilful or malicious injury done by his servant without his knowledge or consent; but only for injuries which are done by the servant in the master's service in the course of his employment." Further, in this passage, Story is not merely generally speaking of the master's liability for the acts of his servant, but is specially treating of his liability with respect to the "hire of things." Moreover, this statement of the Law is reiterated in Story's Treatise on *Agency* (§ 452 to 457), if anything, in even stronger terms; and the statement so made is declared by Williams, J., in *Coleman v. Riches*† to be "good Law." Once more, the bailment of Pawn is very analogous to that of *locatio conductio rei*, in that each is a bailment for the benefit of both parties to the contract. Story‡ states the rule applicable in such cases to be: "when the bailment is reciprocally beneficial to both parties, the Law requires ordinary diligence on the part of the bailee, and makes him responsible for *ordinary* neglect." The provision of the Pawnbrokers Act, 1872, 35 & 36 Vict., c. 93, sect. 8, may, therefore, be of some interest in this connection (and also as throwing some light on that point of the "public benefit," which will shortly be considered). The section of the Act referred to runs as follows:—"For the purposes

* *Bailments*, § 402.

† 24 L.J. C.P. 125, at p. 131. See, too, 16 C.B., at p. 120.

‡ *Bailments*, § 23.

of this Act, anything done or omitted by the servant, apprentice, or agent of the Pawnbroker *in the course of or in relation to the business of* the Pawnbroker shall be deemed to be done or omitted (as the case may be) by the Pawnbroker ; and anything by this Act authorised to be done by a Pawnbroker may be done by his servant, apprentice, or agent."

Thus the Legislature, when framing severe and careful regulations for the business of a Pawnbroker, stopped very far short of what the learned Judges in *The Coupé Co. v. Maddick* regard as the "general considerations" drawn from the principles of the Common Law. If the horse and carriage had been pawned to the defendant, and a similar fate had befallen them as did when they were hired, the defendant could not have been held liable on the County Court Judge's finding of facts.

At Common Law, too, if a servant steal a pledge without any negligence on the part of his master, we have the most unambiguous authority that the master is not liable.* In the case deciding this, where curiously enough Cave, J., was one of the Court, and Mr. Charles, Q.C., appeared for the pawnbroker, the judgment, reported by a very experienced reporter, is as follows :—"The Court were clear that the pawnbroker was not liable, as he had not been guilty of any negligence." The same has been decided by Lord Kenyon, of a theft committed by servants of the bailor of goods kept for hire.† But what difference in principle is there between

* *Armfield v. Mercer*, 2 Times L.R. 764. The Supreme Court of the United States has considered the same subject in *McLemore v. Louisiana State Bank*, 91 U.S. (1 Otto 127).

† *Finucane v. Small*, 1 Esp. 315. The learned Judges in *The Coupé Co. v. Maddick* observed of this case, which was cited to them, that it was not to the point, because "there was an act of the servant which was tortious as against the letter of the goods, and which gave him a right of action against the servant for a conversion of the goods." *Mears v. The London and South Western R. Co.*, 11 C.B. N.S. 850, sufficiently points the insufficiency of this distinction.

these cases and the present? And if the fact of theft by a servant does not necessarily render the master liable, on what ground of "general consideration" should he be precluded from shewing he was not negligent where the detriment to the bailment is caused by the wanton wrongful act of his servant? In such case the quality of the act is the same—a wanton, that is a wilful, and a wrongful act in defiance of the rights of the master. The consequences only are different: in the one case, that of theft, the chattel is wholly destroyed or lost to the owner; in the other, the chattel is only partially destroyed, or "permanently injured." Yet in the former, by a chain of authorities absolutely insuperable, the master is held free from liability for the act of his servant; in the latter, Cave and Charles, J.J., are of opinion that he is liable.

There is yet another *possible* way of vindicating the decision on the basis of the fact of the injury being inflicted by the servant of the hirer, and not by a stranger.

It is an undoubted principle of Law that where injury is caused to a third person or his property through the mere non-feasance of a servant or agent, an action will only lie against the master, and the servant whose non-feasance produces the injury goes free notwithstanding. This is, as already indicated, on the ground that there is no duty owing from the servant to the owner; and the injury has been brought about from the servant not undertaking any. The servant's conduct towards the master, however, constitutes a breach of contract. The view of the facts in *The Coupé Co. v. Maddick*, necessary to secure the benefit of this principle, is that the injury done to the horse and carriage was the result of a mere absence of care in the servant, and not of a positive wrongful act. The principle now to be investigated is most authoritatively laid down by Holt, C.J., in *Lane v.*

Cotton,* in these terms: "For a neglect in him" (i.e., the servant) "they" (those suing) "can have no remedy against him, for they must consider him only as a servant; and then his neglect is only chargeable on his master or principal; for a servant or deputy *quatenus* such cannot be charged for negligence, but the principal only shall be charged for it; but for a misfeasance an action will lie against a servant or deputy, but not *quatenus* a deputy or servant, but as a wrongdoer." This is explained by what Ashhurst, J., says in *Elsee v. Gatward*,† "The distinction is this: if a party undertake to perform work, and proceed on the employment, he makes himself liable for any misfeasance in the course of that work; but if he undertake and do not proceed on the work, no action will lie against him on the non-feasance."

If, then, the coachman's default was mere negligence in the discharge of his duty as coachman, he would not be personally liable to the owner. If, on the other hand, the coachman's default was a misfeasance, then the owner could hold him personally responsible as a wrongdoer.‡ Now the act, as found by the County Court Judge, was starting with the horse and carriage on a new and independent journey, which had nothing to do with the servant's employment; and in the course of such journey, through absence of care, or more probably from actual wrongdoing

* 2 Mod., at 488.

† 5 T.R. 145. In *Mill v. Hawker*, L.R. 10 Ex. 92, the Exchequer Chamber held a surveyor, required by statute to obey the orders of a Highway Board, liable for trespasses committed in the course of obeying the orders of the Board. The law was settled so long ago as 1815, in *Stephens v. Elwall*, 4 M. & S. 259, by Lord Ellenborough, C.J.

‡ "The point is," says Lee, C.J., in *Perkins v. Smith*, 1 Wils. 328, "whether the defendant is not a *tort feasor*, for if he is so, no *authority* that he can derive from his *master* can excuse him from being liable in this action." *Per totam curiam*, "The taking upon him to *dispose* of another's property is the *tortious* act, and the *gist* of this action."

—for the coachman was drunk—the horse and carriage were injured. Waiving, however, this point, and assuming that the actual injury was brought about by mere absence of care without the presence of any positive tortious element, there is the authority of Lord Ellenborough for the proposition, “if one put an animal or carriage in motion, which causes an immediate injury to another, he is the *actor*, the *causa causans*.” Thus, he who carelessly uses another person’s goods is guilty of a misfeasance as regards one aspect of his act, so far, that is as relates to the rights of the third person whose goods are injured ; but the contention must be that so far as relates to the other aspect of his act, so far, that is, as regards the actual instrument of the mischief, he is a mere non-feasor. The doctrine may be tested again by taking the statement of the principle applicable as laid down by Paley *On Principal and Agent* (Lloyd’s Ed., at p. 397) : “An agent is personally liable to third persons (*in tort*) for doing something which he ought not to have done, but not for not doing something which he ought to have done.”

As against the master, the servant’s act was, say the learned Judges, “a breach of the duty arising out of the relationship of master and servant.” In what relevant sense the breach was one “arising out of the relationship of master and servant” is not clear. Half a century ago, the House of Lords established the proposition that, “Whenever there is a contract and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the plaintiff may either recover *in tort* or in contract.”* However that may be, it cannot be contested that the servant’s act as against his master was a breach of duty, a trespass, a deliberate act done contrary to the

* *Boorman v. Brown*, 11 Cl. & Fin. 1.

master's orders.* Moreover, the trespass resulted in a "permanent injury" to the chattel. And this, we have seen, had the trespasser been a stranger, would have given the owner a right of action against him.

To sustain the case, then, on this ground, it must be established that the act of the servant, which as against his master is a trespass, as against his master's bailor is a mere non-feasance. But here we are getting well advanced into Hegelianism, the doctrines of which it may be presumed the learned Judges were not proposing to carry into the interpretation of English Law, for in this aspect of the case, we are driven to contend that conduct is at the same time and with reference to the same things both an act and not an act.

II. The second ground for the decision is stated to be "general principles of the public benefit." The generality of this ground is emphatically the most striking feature about it.

There is, doubtless, great discrepancy in the *dicta* on this question of "public benefit," which is, apparently, a synonym for the better known term "public policy."†

The forcible expression of Burrough, J., said by Lord Bramwell to be borrowed from Hobart, C.J.,‡ has recently been several times quoted:—"I, for one, protest, as my Lord has done, against arguing too strongly upon public policy; it is a very unruly horse, and when once you get astride of it you never know where it will carry you. It may lead you from the sound Law. It is never argued at all but when other points fail." § It may be noted

* *Syeds v. Hay*, 4 T.R. 264.

† The best estimate of the tendency of the decisions that I know of is in Sir Frederick Pollock's book on *Contracts*, 5th ed., p. 298, *et seq.*

‡ *Mogul Steamship Co., Ltd., v. McGregor, Gow & Co.*, 8 Times L.R. 182, at p. 185.

§ *Richardson v. Mellish*, 2 Bing. 229, at p. 252.

that the view of Cave, J., seems to be in entire accord with that of Burrough, J., in this estimate of "public policy" as a ground of decision; for he describes it as "a branch of the Law * which certainly should not be extended; as Judges are more to be trusted as interpreters of the Law than as expounders of what is called public policy." Parke, B., who in the opinion of no mean authority,† was "probably the most acute and accomplished lawyer this country ever saw," considered this matter of "public policy" with some elaboration in the opinion he gave to the House of Lords in *Egerton v. Brownlow*.‡ The decision of the House was indeed adverse to the view of the case taken by Parke, B.; § but that decision in no way overruled his remarks on the point now in question, and they are, though lengthy, of the greatest cogency. Public policy, he says (at p. 123)—"is a vague and unsatisfactory term and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may and does in its ordinary sense mean a political expedience, or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and disposition of each person who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision would lead to the greatest uncertainty and confusion. It is the province of the statesman and not the lawyer to discuss, and of the Legislature to determine what is best for the public good, and to provide for it by proper enactments. It is the

* *In re Mirams*, L.R. [1891] 1 Q.B., at p. 595.

† Blackburn, J., in the Exchequer Chamber, in *Brinsmead v. Harrison*, L.R. 7 C.P., at p. 55.

‡ 4 H.L.C. 1; 23 L.J. Ch. 348.

§ The opinion of four Law Lords and two of the Common Law Judges prevailed over the opinion of the Chancellor and eight Common Law Judges.

province of the Judge to expound the Law only ; the written from the statutes ; the unwritten or Common Law from the decisions of our predecessors and of our existing Courts, from text writers of acknowledged authority, and upon the principles to be clearly deduced from them by sound reason and just inference ; not to speculate upon what is the best, in his opinion, for the advantage of the community. Some of these decisions may have, no doubt, been founded upon the prevailing and just opinions of the public good ; for instance, the illegality of covenants in restraint of marriage or trade. They have become a part of the recognised Law, and we are therefore bound by them, but we are not thereby authorised to establish as Law everything which we may think for the public good, and prohibit everything which we think otherwise. The term 'public policy' may indeed be used only in the sense of the policy of the Law, and in that sense it forms a just ground of judicial decision. It amounts to no more than that a contract or condition is illegal which is against the principle of the established Law. If it can be shewn that any provision is contrary to well-decided cases or the principle of decided cases, and void by analogy to them and within the same principle, the objection ought to prevail." If Parke, B., was anything near right in his view, it is very plain that considerations of public policy have nothing to do with the case now being discussed. "Public policy" is, as suggested by Burrough, J., a last ground of preference. But for the solution of any puzzle involved in the present case, there are, as we have seen, abundance of determining principles and analogies. A consideration, possibly present to the minds of the learned Judges in deciding *The Coupé Co. v. Maddick*, may have been what Austin, quoting from Paley, calls the celebrated phrase, "the competition of opposite analogies."

The Legal principle, that the master is only liable for the act of the servant so long as the servant is acting in the

scope of his duty, is indisputable. The finding of fact by the County Court Judge was that the act from which the alleged cause of action arose was wholly outside the servant's duty. The learned Judges, it is submitted, were bound by this finding. If, then, the principle was applicable, it was conclusive. But there is another principle which the superior Court considered applicable, that where there is legal wrong, there the Law gives a remedy. The Court, possibly hastily, assumed there was no remedy against the wrongdoer; and for the determination of the ground of preference between the competing principles they resorted to the consideration of the "public benefit." But one of the postulates on which, in this view, the reference to "general principles of the public benefit" is invoked, does not hold good. We have seen that there is ample authority for holding that the owner can "recover over against" the actual wrongdoer where "permanent injury" is done to an article.* If so, there is no case for calling in the very dubious "general principles of the public benefit." But if this *deus ex machinâ* is to descend, it may be well to consider the precise grounds of the intervention.

They are thus set out in the Judgment :—"Where one of two innocent parties has to suffer a loss arising from the misconduct of a third party, it is to the public advantage that the loss should fall in such a way as to diminish the probability of such a thing happening again, or, in other words, that it should fall on that one of the two who could most easily have prevented the happening or the recurrence of the mischief." It seems to be a fatality of this case that one is not able to look at it on any side without finding it in sharp conflict with principles accepted by high authority

* The action must either be brought against the hand committing the injury or against the owner for whom the act was done, or against both the one and the other jointly. *Addison on Torts*, 5th Ed., by Cave, at p. 102, citing *Stone v. Cartwright*, 6 T.R. 411.

as Law. Its infelicity is not wanting in this latest statement of principle. Whether, as the proposition is framed, it was ever Law is more than doubtful. At any rate, Lord Field, in a recent very notable case,* points out that if it ever was Law, it is so no longer. The broad proposition, that whenever one of two innocent parties must suffer by the act of a third person, he who has enabled such person to occasion the loss must sustain it, is indeed asserted in a case of the last century by one of the Judges.† But subsequent decisions have largely pared away the generality of the statement. The authorities require the neglect alleged to be firstly in the transaction itself, and the proximate cause of the loss that arises; and secondly to be the neglect of some duty, that is owing to the person on whom the loss immediately falls.‡ Now, if there is a duty in the circumstances owing from the master to the owner, and a breach of it, there is no need of the intervention of the principle. For the master is already liable, and the ground of his avoidance of liability is that in the circumstances there is no duty, or if a duty, no breach. But if there is no duty, the “general principles of the public benefit,” specially prayed in aid of the owner’s case, are not applicable.

Again, the loss from the misconduct of a third party is only to fall on “that one of the two who could most easily have prevented the happening or the recurrence of the mischief,” where there is negligence in the transaction itself, and the negligence is the proximate cause of the loss that arises. But here, by the finding of the County Court Judge, there is no negligence; and the proximate cause of the mischief does not seem, from any point of view, to have been the innocent master. It might also be pointed out

* *Bank of England v. Vagliano*, L.R. [1891] A.C. 169.

† *Per Ashhurst, J., Lickbarrow v. Mason*, 2 T.R. 70.

‡ *Arnold v. Cheque Bank*, 1 C.P.D. 568, citing *Bank of Ireland v. Evans's Charities*, 5 H.L.C., 389.

that the decision in this case is in the nature of an exception to the general rules of Law. The maxim, *culpa tenet suos auctores tantum*, and "loss lies where it falls," express the legal presumption of liability; and any divergence from these must establish its existence as an exception; but the Court in this case seem to have proceeded on quite an opposite method, and to have presumed against the general rule to the extent of devising a new exception from it.

To conclude, however, in agreement where so much has been urged in disagreement—no one can doubt but that *The Coupé Co. v. Maddick* has been decided in a way wholly unfettered by precedent, and on principles which must stand or fall by their intrinsic qualities.

THOMAS BEVEN.

II.—PRIVATE INTERNATIONAL LAW OF DIVORCE. II.

ENGLISH DIVORCE.

SECTION (2.) The English Court of Divorce has the jurisdiction to dissolve any marriage, English or foreign, if the parties are at the date of the institution of the suit domiciled in this country, perfectly irrespective of the actual residence of either party, their nationality, and matrimonial domicile, the place of marriage, *locus delicti* and the delictual domicile (*Ratcliff v. Ratcliff*, 1859, 1 Sw. and Tr. 217; *Pellew v. Pellew*, 1859, 1 Sw. & Tr. 553; *Macdonald v. Macdonald*, 1859, 4 Sw. & Tr. 242; *Tollemache v. Tollemache*, 1859, 1 Sw. & Tr. 557; *Wilson v. Wilson*, 1872, L.R. 2 P. & D. 441; *Gillis v. Gillis*, 1874, 8 L.R. Eq. 597 (Irish); *Niboyet v. Niboyet*, 1879, 4 P.D. 1; *Briggs v. Briggs*, 1880, 5 L.D. 153; *D'Etchegoyen v. D'Etchegoyen*, 1888, 13 P.D. 132).

The jurisdiction of the Court of Divorce in England now depends on the Matrimonial Causes Act, 20 & 21 Vict., c. 85, which created new Courts and enabled them for the first time to grant a decree *à vinculo matrimonii*, a power hitherto denied even to the Ecclesiastical Courts, being exclusively exercised by the House of Lords upon petition. The 27th section of the statute regulating the question of competence enacts that: "It shall be lawful for any husband to present a petition to the said Court praying that his marriage be dissolved on the ground that the wife has since the celebration thereof been guilty of adultery, and it shall be lawful for any wife to present a petition praying that her marriage be dissolved" on grounds stated therein. Upon the construction of this section it was first held, in *Ratcliff v. Ratcliff*, 1859, that the simple fact of domicile was alone sufficient to clothe the English Courts with jurisdiction under the Act. This view received marked recognition at the hands of Lord Penzance in *Wilson's Case*, 1872, and it is now settled beyond the possibility of a doubt that if the parties are domiciled in England at the beginning of the divorce proceedings, the Courts of this country may dissolve the marriage, wherever the parties are actually resident, whatever be their nationality, or their domicile at the time of marriage, and at the time of the commission of the crime, and even though the marriage was celebrated and the offence committed abroad. The crucial test is, of course, the domicile of the husband, whether original or acquired, the domicile of the wife following that of the husband, and thus bringing her within the power of his personal law. Whether a domicile fraudulently and collusively acquired in England by persons quitting their own country, where a dissolution *à vinculo* is not granted, would affect the matter of jurisdiction here, and whether, if the doctrine that the rule of law as to the identity of the wife's domicile with the husband's

had under certain circumstances (*e.g.*, judicial separation, wilful desertion) to give way to considerations of expediency and justice in the case of a husband abandoning his English domicile and gaining one abroad, was fully and finally established in England by high authority, our Courts would apply the same principle to foreigners acquiring an English domicile under the same circumstances, and refrain from exercising jurisdiction over them, are points on which not even a reliable dictum exists. The solution of this question would no doubt depend upon the construction of the Act conformably to general principles of International Law, but so far as the present decisions go they are clearly in favour of the rule as above laid down.

Illustrations. i. A., an officer in the English Army, married B., a domiciled Englishwoman, in India. After some years the lady misconducted herself in India with another officer. A. was, both at the times of the marriage and of the divorce, domiciled in England. *Held*, that 20 and 21 Vict., c. 85, gave jurisdiction, as the husband was domiciled in England at the dates of the marriage and of the suit, though the marriage and adultery were abroad. *Ratcliff v. Ratcliff*, 1859.

ii. A., a domiciled Englishman, married B. in Brussels. Soon after, he was appointed to the command of a squadron in China, but returned to Europe three years later. B., in the meanwhile, eloped from Paris with C., and was residing with him in Brussels. A., not having lost his domicile, the Court decreed a dissolution of the marriage. *Pellew v. Pellew*, 1859.

iii. A., an officer in the English army, was married to B. in India. The adultery was committed in Australia, and the refusal of restitution of conjugal rights also made there. A., being domiciled in England at the time of marriage and at the time of the proceedings, the Court pronounced a decree in favour of the wife on the ground

of adultery and desertion by her husband. *Macdonald v. Macdonald*, 1859.

iv. B., a domiciled Englishman, married C., a domiciled Scotchwoman, at Gretna Green and afterwards in England. B. and C. cohabited together in England and Wales, but principally in Scotland. C. afterwards eloped with P. in Glasgow, and B. thereupon obtained a divorce in Scotland. C. then married P. in Scotland. B. afterwards brought a suit in England to dissolve his marriage. *Held*, that without going into the question of the effect of the divorce in Scotland in respect of the second marriage there contracted and the children of that marriage, sitting here as an English Matrimonial Court, it could not recognise that divorce as putting an end to the marriage bond of an Englishman domiciled continuously in England. The Court then dissolved the marriage. *Tollemache v. Tollemache*, 1859.

v. A. and B., domiciled Scotch persons, married in Scotland. Some years afterwards the husband, discovering the wife's adultery, broke up his home, and came to reside in England permanently. *Held*, he had abandoned his domicile of origin, and had acquired an English domicile, and that, therefore, the Court had jurisdiction to dissolve the Scotch marriage. *Wilson v. Wilson*, 1872.

vi. A., having domicile of origin in Ireland, married B., in France, at the British Consulate. After marriage the parties always lived abroad, and the adultery was committed abroad. The wife was resident abroad at the time of the suit. *Held*, that the Irish domicile of the husband remained at the time of his petition for a divorce (*à mensâ*), and that in consequence the jurisdiction of the Irish Court was undoubted. *Gillis v. Gillis*, 1874.

vii. A. and B., two English persons, married in England. The husband afterwards went to Kansas, and after a year presented a petition and obtained a divorce by reason of

his wife's desertion. He then married again in the United States. The wife, who was resident in England, had no notice of the proceedings in Kansas. She now brought an action to dissolve her marriage with A. The respondent did not enter an appearance to his wife's petition. *Held*, that his domicile at the period of the suit was still English, that, therefore, the foreign divorce was null and void, and that he had committed bigamy. Accordingly, the Court granted a decree *nisi* dissolving the marriage. *Briggs v. Briggs*, 1880.

viii. A., born in France, of French parents, but domiciled in England, went, in 1876, to Canada, where he became a cattle farmer. In 1878 he married B., a domiciled Canadian, in the city of Quebec. In 1882 he brought his wife and family to England. Between 1884 and 1887 he kept going to Canada and coming back again to England. In 1887, while resident in France, he brought this action to dissolve his marriage by reason of the wife's adultery in England. The wife appeared under protest, pleading that his domicile was Canadian or French, but not English, and that the Court had no jurisdiction. *Held*, that the petitioner had not lost his English domicile, and that, therefore, the Court had jurisdiction. *D'Etchegoyen v. D'Etchegoyen*, 1888.

With respect to other cases on the subject of the rule three deserve especial attention. In *Bond v. Bond*, 1860, 2 Sw. & Tr. 93, the domicile of the husband was probably English at the time of the proceedings taken by the wife. At all events it was not clear that he was domiciled in Ireland, and although the case was decided upon the principle of English nationality, it is certainly also capable of explanation on the ground of the English domicile, and it has accordingly been so construed by several text-writers. *Brodie v. Brodie*, 1861, 2 Sw. & Tr. 259, has given rise to a considerable amount of contention as to its *ratio decidendi*, but the better opinion, judicially adopted, is that it proceeds

upon the domicile of the husband at the time of the divorce suit being in England, and in *Niboyet v. Niboyet*, 1879, Brett, L.J., upheld the rule that a domicile in England gives jurisdiction here as part of the more general proposition that domicile is the most essential ingredient to found the jurisdiction of any Court to dissolve a marriage. Thus considered, these cases are three additional authorities in favour of the rule above stated, and under any view these decisions cannot be said to militate against it. At the utmost they may be held to lay down that there are other grounds of jurisdiction besides domicile, viz., English origin and *bonâ fide* residence of the parties in England.

Several points must now be considered in connection with the rule as to the competence of the English Court of Divorce to grant a dissolution *à vinculo*, in the various cases that may arise.

(1.) *English and Foreign Marriage.* Understanding these terms in their substantive meaning, we find it is well established that both kinds of marriages fall within the jurisdiction of the English Courts. It follows as a natural consequence from the universal principle of International Law that jurisdiction depends on the actual domicile of the parties. By the general comity of nations persons abandoning their foreign matrimonial domicile and settling permanently in another country, attract to themselves the laws of their new domicile, so that they become the measure of their personal rights and their status of married persons. Accordingly the Divorce Court has the jurisdiction to dissolve not only an English marriage, whether of British subjects (*Ratcliff v. Ratcliff*, 1859; *Pellew v. Pellew*, 1859; *Macdonald v. Macdonald*, 1859; *Tollemache v. Tollemache*, 1859; *Gillis v. Gillis*, 1874; *Niboyet v. Niboyet*, 1879; *Briggs v. Briggs*, 1880), or of foreigners (*Niboyet v. Niboyet*, 1879; *D'Etchegoyen v. D'Etchegoyen*, 1888), but also a foreign marriage between persons of British or foreign origin

(*Wilson v. Wilson*, 1872; *Niboyet v. Niboyet*, 1879), if the parties are domiciled in England at the beginning of the institution of the proceedings, that is if the husband is domiciled here at such time, for his wife's matrimonial home will by construction of law be in the new country which he has adopted as his own.

(2.) *Residence of either Party.* Jurisdiction being already sufficiently created by the domicile to enable the Court to pronounce a dissolution of the marriage, the residence of either party, at the time of the suit or before, is immaterial. This proposition was embodied in a late decision where it was held that "domicile without residence is sufficient to sustain the jurisdiction, and the jurisdiction is not defeated by non-residence, except in cases where non-residence affects the domicile." *Gillis v. Gillis*, 1874, L.R. 8 Eq. 597 (Irish). The foreign residence of the husband, where he is as a matter of fact domiciled in England, will be no bar to the power of the Court, whether he was so resident prior to his marriage and has ever since been continuously abroad (*Macdonald v. Macdonald*, 1859), or has gone abroad after marriage, and is still resident there when the petition is presented (*Briggs v. Briggs*, 1880; *D'Etchegoyen v. D'Etchegoyen*, 1888), and similarly "the domicile of the husband will sustain the jurisdiction of the Court over the wife, though married abroad, and always after resident abroad, and charged with adultery committed abroad" (*Gillis v. Gillis*, 1874; *Pellew v. Pellew*, 1859; *Tollemache v. Tollemache*, 1859). In accordance with the last principle, it appears that the domicile of the husband must have been regarded as English by the learned Judges in *Brodie v. Brodie*, 1861, 2 Sw. & Tr. 259, for otherwise the Court would assuredly not have had jurisdiction. If the domicile of the husband was considered in that case to be Australian, then the exercise of jurisdiction by the English Court over the wife in a case where she was domiciled and resident abroad,

where the marriage and adultery were abroad, would have been an arbitrary assumption of power which it did not really possess. It is true she was served with the notice of the petition, but mere service does not confer jurisdiction when the person cited does not appear and submit.

(3.) *Matrimonial Domicile.* When the married persons have quitted their matrimonial domicile and established a permanent home in some other country, the law of this domicile has lost its hold upon the parties, and their status now falls to be governed by the law of the country into which they have transferred their *lares*. The country or society which they have left is not interested in their marriage so long as they are domiciled elsewhere. They have become members of a new community, and their legal position with reference to such community will be determined by the laws of that country. From this principle several results follow. One is that the English Court will acquire the jurisdiction of dissolving the tie, wherever the husband may have been domiciled at marriage, provided he is at the time of the suit domiciled in England (*Wilson v. Wilson*, 1872; *Niboyet v. Niboyet*, 1879). The domicile of the wife immediately prior to the marriage is also immaterial. Another consequence is that the Court may completely sever the bond, although under the law of the matrimonial domicile divorce *à vinculo* does not exist (*Le Sueur v. Le Sueur*, 1876; *Niboyet v. Niboyet*, 1879), the question of dissolubility or indissolubility being referred to the *lex fori* of the new domicile. A third proposition is that the various causes of divorce will be determined by English Law, whatever be the grounds recognised in the country of the matrimonial domicile. See *Burton v. Burton*, 1873; *Manning v. Manning*, 1871, *infra*.

(4.) *Nationality of Either Party.* According to the law of England civil status depends not upon nationality but

upon domicile alone. (Lord Westbury in *Udny v. Udny*, 1869, L.R. 1 H.L. Sc. & Div. 441), hence the allegiance of the parties will not affect the competence of the English Courts to grant a divorce. It was at one time believed that the Act applied only to English subjects, but that view is exploded now. It must be borne in mind that the Matrimonial Causes Act, 1858, applies only to England, and all other countries, including Ireland and Scotland, are for the purposes of the Act treated as foreign countries equally with France or Spain (*Yelverton v. Yelverton*, 1859, 1 Sw. and Tr. 574; *Firebrace v. Firebrace*, 1878, 4 P.D. 63). In *Deck v. Deck*, 1860, the husband, who had abandoned his English domicile, was nevertheless held subject to the provisions of the Act by reason of his English nationality, and in *Bond v. Bond*, 1860, 2 Sw. & Tr. 93, the Court decided that it did not so distinctly appear on the evidence that the husband's origin was Irish as to oblige it to consider whether its jurisdiction over a foreigner could be maintained, and pronounced for jurisdiction under section 27 upon the petition of the English wife. Even in the mind of Sir Cresswell Cresswell, who enounced this theory in the above two cases, it must have had an ephemeral existence, for in the very next year we find the learned Judge upholding the jurisdiction of the Court over a person, Scotch by origin (*Brodie v. Brodie*, 1861, 2 Sw. & Tr. 259), and Lord Penzance in 1872 dissolved a Scotch marriage of Scotch parties (*Wilson v. Wilson*, 1872). And after the cases *Niboyet v. Niboyet*, 1879, and *D'Etchegoyen v. D'Etchegoyen*, 1888, it is clear that political allegiance is not a factor in the consideration of the question of jurisdiction.

Country of Marriage. The question of divorce is not an incident of the marriage contract to be governed by the *lex loci contractûs*, but is an incident of status to be disposed of by the law of the domicile of the parties. The Court

of the domicile may disregard altogether the fact that the marriage has been celebrated abroad.

Locus delicti. The fact of the offence in respect of which a divorce is sought having been committed abroad does not thereby render the parties in any way amenable to the *lex loci delicti commissi*. Whether the marriage is dissoluble or not, whether the grounds upon which our Courts proceed to pronounce a decree are, or are not, recognised as sufficient to found an action of divorce, *vel lege loci contractus vel lege loci delicti*, the English Courts will dissolve the marriage bond of persons domiciled in England, notwithstanding that the marriage and crime were both abroad in the same country (*Ratcliff v. Ratcliff*, 1859; *Tollemache v. Tollemache*, 1859; *Wilson v. Wilson*, 1872; *Gillis v. Gillis*, 1874), or in different countries (*Macdonald v. Macdonald*, 1859), or partly in one country and partly in another (*Pellew v. Pellew*, 1859). So also if the marriage was solemnised in England and the offence has been committed elsewhere (*Briggs v. Briggs*, 1880), or conversely, if the marriage was had in a foreign country and the cause arose in this country (*D'Etchegoyen v. D'Etchegoyen*, 1888; *Niboyet v. Niboyet*, 1879).

Delictual domicile. This point has never arisen in England, but there is no doubt that if persons domiciled at the time of the delict in any country, abandoned that country and acquired a domicile in England before instituting proceedings, the English Courts would have jurisdiction even if by the law of the delictual domicile the marriage was absolutely indissoluble or dissoluble for causes different from those which furnish a ground of action in England.

Section (3.) The English Court has no jurisdiction to dissolve a marriage when the parties are not completely domiciled in England at the period of the divorce proceedings (*Yelverton v. Yelverton*, 1859, 1 Sw. & Tr. 574; *Manning v. Manning*, 1871, L.R. 2 P. & M. 223; *Wilson v.*

Wilson, 1872, L.R. 2 P. & M. 441; *Le Sueur v. Le Sueur*, 1876, 1 P.D. 139; *Firebrace v. Firebrace*, 1878, 4 P.D. 63; *Niboyet v. Niboyet*, 1879, *per* Brett, L.J., *vide* *Duggan v. Duggan*, 1874, 64 L.T. 152 (Australian) and *Harvey v. Farnie*, 1882, 8 App. Cas. 43, *per* Lords Selborne and Blackburn commenting on *Niboyet's Case*).

We have now arrived at the most important part of the International Law of Divorce: the consideration of the jurisdiction of the English Court to pronounce a decree in the absence of domicile. The subject already involving vexed questions of great difficulty has been further rendered unnecessarily perplexing by the introduction of a novel conception of domicile. We might have hoped after the numerous decisions on the nature of domicile to be found in the books, that the legal idea of domicile was the one matter above all others about which there could be no controversy. But when the matter came to receive consideration in the Matrimonial Court, in connection with Divorce, the learned Judges of that Court seem to have thought that there were two kinds of domicile, one regulating a man's matrimonial relations and another the succession to his property. This distinction, hitherto unknown, was taken up and formulated by Sir Cresswell Cresswell in *Yelverton v. Yelverton*, 1859, 1 Sw. & Tr. 574, in these words: "The word domicile has many meanings; accordingly as it is used with reference to succession and other purposes, a person may have retained his foreign domicile for many purposes, and yet may be domiciled in England to give jurisdiction to the Court for divorce and matrimonial causes," and it, ostensibly at least, formed the basis of the decision in *Brodie v. Brodie*, 1861, 2 Sw. & Tr. 259. Lord Penzance, however, recorded his dissent from this theory in two important cases, *Manning v. Manning*, 1871, L.R. 2 P.D. 223, and *Wilson v. Wilson*, 1872, L.R. 2 P. & D. 441; and Lord Justice Brett, com-

menting on the proposition of the full Court. in *Brodie v. Brodie*, remarked thus: "If this was held to be a domicile, it is consistent with all the cases. If it is to be taken to be a decision that there can be a minor species of domicile sufficient for one purpose and not for another, I know of no authority or ground of reason for such a distinction, I cannot agree with it." *Niboyet v. Niboyet*, 1878, 4 P.D. 19. But this point need not detain us any longer, as the view is not likely to be rehabilitated in future.

In examining the various authorities of this class it will hardly be of much practical utility to wade through the arguments and decisions of the Ecclesiastical Courts before the constitution of the Matrimonial Courts. "I do not think that cases arising before the Ecclesiastical Courts in which a matrimonial offence being alleged against subjects or against domiciled foreigners, the question arose whether by reason of their temporary sojourn in one of the dioceses they might be served with process in that diocese are applicable. Such questions did not raise the point of general jurisdiction of the law of the country, but rather a question of procedure within an admitted jurisdiction of such law . . . the decisions of our own country before the Statute being, it should be observed, necessarily decisions as to the extent to which the English Courts, and the English Legislature acting as if judicially, recognised the decisions of foreign Courts." *Niboyet v. Niboyet*, Brett, L.J., 4 P.D. 19.

The correctness of the rule above as a general proposition will scarcely now be disputed. There is, however, no English case among our Reports in which this principle has expressly formed the basis of the decision, and the jurisdiction of the Divorce Court been repudiated on the ground of the absence of permanent residence in this country, when the parties having a foreign domicile were more than casually present here; that is to say, under

circumstances of residence beyond a mere being in England but falling short of a complete or full domicile. In *Niboyet v. Niboyet*, 1879, Sir Robert Phillimore in the Court below, and Brett, L.J., in the Superior Court, went to the full length of adopting this doctrine as the only sound result arising as well from the construction of the Statute as from the authorities, and this view had been previously expressed by the Supreme Court of Victoria, in *Duggan v. Duggan*, 1874. The exact state of the authorities down to date upon this question of jurisdiction will be summarised in the next part of this Paper.

E. H. MONNIER.

III.—CONTEMPT OF COURT.

V.—PRACTICE.

i. *Process as to Contempt in face of or on proper motion of Court.*

Contempt in view of Judge—Within precincts of Court—Court having cognisance of serious offence—Contempt at Chambers, or in the offices.

ii. *Process on application.*

Must be to Court of which act a contempt—Contempt to be brought to notice of Court promptly—Generally, but not necessarily, by party in cause—Proceeding not in the cause, but separate matter—Course under Judicature Acts—Chancery Division—Queen's Bench and Probate Divisions—Crown side of Q.B.D.—Attachment on committal—Amending—Motion or summons—Notice—Notice of motion—Service—Objection—Waiver—Service out of Jurisdiction—Length of notice—Short notice—Service of copy affidavits with notice—Respondent not appearing—Probate Division affidavits and documents therein referred to to be filed in Registry—Hearing of motion—Evidence—Respondent entitled to see affidavit in reply—Contents of respondent's affidavit—In case of infant—Question turning upon meaning of document—Mere technical contempt—Parol order or writ—The punishment—Form of order.

iii. *Costs.*

In discretion of Court—Should be asked for at the hearing of the motion—Frivolous application—Mere technical contempt—Party moving himself

—Having supplied material for contempt in respect of which he moves—
Costs as between solicitor and client—"Costs occasioned by the contempt"
—"Charges and expenses."

iv. *Execution and Arrest.*

Process to be strictly complied with—Writ ordered to lie in office—
Arrest on Sunday—Breaking outer doors—The imprisonment.

v. *Rights of and Proceedings by Party in Contempt.*

General rule—Want of authority as to criminal contempts—Construction of—Confined to proceedings in same cause—Where party comes forward voluntarily to ask a favour—Defendant—Plaintiff—Party suffered to proceed without objection—Notice of motion—Motion—Person illegally imprisoned.

vi. *Discharge and Clearing.*

(a.) *Purging contempt.*

(1.) *Generally.*

Application to discharge, how made—Notice—Jurisdiction of Court—May discharge if deems punishment adequate—Does not require apology to party aggrieved—Counsel moving for discharge entitled to priority—Condition of discharge—Submission—Other modes of relief in discretion of Court—Costs—Discharge by statute—General necessity for application to Court.

(2.) *Wards.*

Settlement—General form of, and rules as to—No power to compel male, or, *semble*, female, ward to execute of own property—Application to release—All circumstances considered—Gravity of the offence—Enquiry as to marriage—Costs.

(b.) *Pardon.*

Effect of—Position *in curia* of party pardoned.

(c.) *Appeal.*

None from High Court—Rule in cases where there is.

(d.) *Irregularity.*

(1.) *Application to Discharge.*

General rule as to irregularity—Examples of irregularities—Objections must be specifically stated in summons or notice of motion—Costs—Attachment not procured in good faith.

(2.) *Certiorari ; Prohibition ; Habeas.*

Warrant or order of superior Court of Record—Warrant or order of inferior Court of Record—Affidavits—*De contumace capiendo*.

vii. *Practice in Bankruptcy.*

Note to Art. V., § v. [*Rights of and Proceedings by Party in Contempt.*]

IN a Criminal matter concerning the liberty of the subject, the utmost strictness must be observed, and a person moving for committal or attachment as for a Criminal contempt is peculiarly liable to have his motion dismissed with costs if he does not comply with the requirements of practice.* If the offender has had the proper notice or knowledge of the proceedings, and an opportunity of answering, it is not matter of necessity that he should be present at the adjudication.† But there should be a charge, a finding, and a sentence, everything should be strictly and accurately pursued, and if in any one of these three points a substantial defect should appear, it would be a ground for saying that the proceeding was bad.‡

§ i. *Process as to contempt in face of, or on the proper motion of, the Court.*

If a contempt is committed in the face of a Court of Record, in the view and immediate observation of the Judge or Judges of the Court, the Court may immediately record the crime, and without further authentication commit the offender, or award such other accustomed punishment

* *Ex parte Ferrige*. In *re Ferrige*, 1875, L.R. 20 Eq. 289; *O'Shea v. O'Shea*, *Times*, 15th January, 1890, Butt, J. But see *Petty v. Daniel*, 1886, 34 Ch.D. 172, Kay, J.; *Ex parte Green*. In *re Robbins*, 1891, 7 T.L.R. 411.

† *Rex v. Clement*, 1821, 4 B. & Ald. 218; *Long Wellesley's Case*, 1831, 2 Ru. & My. 639; and see *Wilkinson v. Boulter*, 1652, 1 Lev. 162.

‡ *Ex parte Van Sandau*. In *re Martin*, 1844, 14 L.J., Bk. 9, 13, S.C., 1846, 1 De G. 303; In *re Pollard*, 1868, L.R. 2 P.C. 106.

within the competence of the Court, as to the Court may seem fit.*

If the contempt is committed not in view of the Judge, but within the precincts of the Court, it is usual, on application at the bar, at once to swear and examine those who saw what was done, and if the offence is proved, to deal with the offender in the discretion of the Court as aforementioned.†

If the Court is a superior Court, it is proper that, upon having cognisance of a serious offence, as upon reading affidavits filed in another application, the Court itself should direct that the offender committing an offence without the Court, as by making a speech in the obstruction of justice, should be called on to answer, although no application has been made at the bar against him.‡

If the contempt is committed in chambers before the Judge, it would seem that he could adjourn the matter into Court, and then commit or otherwise; § if in the offices, the proper course is for the presiding officer to report straight-way to the Court, either on his own mere motion, or upon application, and to certify the facts, when an attachment ought to issue at once, or, if the officer has not certified the facts, then for the Court itself (the parties litigant declining to take proceedings) to procure verification, where necessary, and then to make an order upon the

* 2 Hawk. P.C., c. 22, p. 206 (ed. 1824); *French v. French*, 1824, 1 Hog. 138; *Watt v. Ligertwood*, 1874, L.R. 2 Sc. & D. 361.

† *Rex v. Wigley*, 1835, 7 C. & P. 4.

‡ *Reg. v. Castro (The Defendant's Case)*, 1873, L.R. 9 Q.B. 219, 230; *Watt v. Ligertwood*, *ubi supra*; *Youghal Election Petition (Barry's Case)*, 1869, 3 Ir. R.C.L. 537. When a person is reported to have made a speech in respect of which he is called upon by the Court to answer as for contempt, and he denies that the report is correct, he should not be required by the Court to state on affidavit what portion of the report he admitted to be correct, and what portion he believed to be inaccurate (*Ib.*).

§ Art. IV., § ii. (d), (iii).

offender to shew cause. The same procedure of verification, and so on, is to be followed where the offence is sending a letter to the Judge,* or to an officer exercising Judicial functions, and if the offender cannot be found, substituted service, as at the address from which the offender wrote a letter, the writing and sending of which constituted the contempt, may be ordered.*

§ ii. *Process on Application.*

Except in some cases provided for by statute† the application must be to the Court of which the thing complained of is a contempt, and the High Court has no jurisdiction to deal with contempt of another Court.‡

A contempt should be brought to the notice of the Court promptly,§ and is generally, but not of necessity, brought by a party in the cause.|| The proceeding, though

* *Martin's Case*, 1747, 2 R. & M. 674n.; *Ex parte Magill*, 1748, 2 Fow. Ex. Pr. 404; *French v. French*, 1824, 1 Hog. 138; *Blackwell v. Tatlow*, 1833, 2 My. & K. 321, 327; *Lechmere Charlton's Case*, 1837, 6 L.J. (N.S.) Ch. 185.

† Courts-Martial. See Art. IV., § iv.

‡ Anon. (In the matter of an application for contempt of Court. *Case of the Printer and Publisher of Punch, Burn's Case*), 1886, 2 T.L.R. 351. Cf. *Cook v. Cook*, 1885, *ib.* 10; *Re Tyrone Election Petition, Macartney v. Corry (Carson's Case)*, 1873, Ir. R. 7 C.L. 242. Where a bill was retained in Chancery to afford plaintiff an opportunity to proceed at Law, Stuart, V.C., held that the suit was pending in Chancery for the purposes of contempt. *Tichborne v. Tichborne*, 1870, 39 L.J. Ch. 398. See further Note ii. to Art. III. (*Contempt by arrest*), and Art. I., § ii. An appeal having been set down, the application is to the Appeal Court. See *Plating Co. v. Farquharson*, 1881, 17 Ch. D. 49; *Persse v. Persse*, 1856, 5 H.L.C. 671.

§ *Re Macleod*, 1842, 6 Jur. 461, so explained s.n. *Ex parte Wilton*, 1 Dowl. N.S. 805, *In re Johnson*, 1887, 20 Q.B.D. 68.

|| See *Coxe v. Phillips*, 1736, Lee, c.t. Hard. 237 (Person aggrieved may move as *amicus curiæ*); *In re Spence*, 1847, 16 L.J. Ch. 309, 312 (*Semble*, anyone may move on behalf of infant ward); *Bunny v. Justices of New Zealand*, 1862, 15 Mo. P.C. 164 (Counsel having knowledge of professional misconduct of other practitioner).

for convenience intituled in the cause, is also properly intituled in the matter of an application for contempt of Court against the offender, naming him and specifying his offence, and is not a proceeding or step in the cause, but a separate proceeding of itself.* The course under the Judicature Acts and Rules, by which the practice is now regulated† is, in the Chancery Division, by motion after notice to the person complained of that he may be committed for contempt, but in the Queen's Bench and Probate Divisions it is not unusual to follow the older Common Law practice of making an application for a writ of attachment, the order for which now, if the application is acceded to, must be absolute.‡

* *O'Shea v. O'Shea, Ex parte Tuohy* (*The Freeman's Journal*), 1890, 15 P.D. 59.

† See *Garling v. Royds*, 1875, 1 Ch. D. 81; *In re a Solicitor*, 1875, *ib.* 445; *Dallas v. Glyn*, 1876, 3 *ib.* 190; *Fupp v. Cooper*, 1879, 5 C.P.D. 26; but *cf.* *Nelson v. Worssam*, 1890, W.N., 1890, p. 216, 35 Sol. Jo. 87; *Mander v. Falcke*, L.R. [1891] 3 Ch. 488.

‡ Ord. lii., r. 2; *Harvey v. Harvey*, 1884, 26 Ch. D. 644, 654; *Hunt v. Clarke, In re O'Malley*, 1889, 58 L.J. Q.B. 490; 61 L.T. 343; 37 W.R. 724; 5 T.L.R. 650; *Sharland v. Sharland*, 1885, 1 T.L.R. 492; *Butler v. Butler*, 1888, 13 P.D. 73; *O'Shea v. O'Shea. Ex parte Tuohy*, 15 P.D. 59; *Angerstein v. Hunt*, 1801, 6 Ves. 488. The last cited case settled the rule in Chancery, but in aggravated cases the notice of motion might be dispensed with. *Anon.*, 1745, 3 Atk. 219 (beating process-server; but see *Elliot v. Halmarack*, 1816, 1 Mer. 302); *Broad v. Wickham*, 1831, 4 Sim. 511 (forcible ouster of receiver). At the Common Law, upon a complaint on affidavit, either a rule was made to attend on a certain day to answer the matter complained of, or rule to shew cause why attachment should not issue, or, if the offence was very exorbitant, attachment absolute in the first instance. 2 Hawk. P.C., p. 206 (ed. 1824); *Reg. v. Castro*, 1873, L.R. 9 Q.B. 219 (rule set out); *M'Gregor v. Barrett*, 1848, 6 C.B. 262. The practice on the Crown side of the Q.B.D. preserves in the main the Common Law practice, Ord. 68, r. 1; Crown Office Rules, 1886, Short 120 *et seq.*, where the subject is fully treated; *De Contumace Capiendo. Ib.* 124; Short and Mellor, *Crown Office Practice*. It is suggested in a note to C. 16, s. 4, of Daniell's Forms (p. 401, Ed. 4), that even in cases where the Court notices the contempt of itself, Ord. lii., r. 2, would now prevent an order *nisi*. But the order would not be an order made in any action (*O'Shea v.*

Where the contempt if criminal* has not been criminal in the same degree as those considered here, upon notice of motion to commit, the Court has granted a writ of attachment,† and where the application has been for a writ of attachment leave has been given to amend the notice of motion by asking for committal.‡ As regards contempts of this kind, also, by Order xlii., rr. 7 and 24, attachment and committal are apparently placed on the same footing, and it has been said that the distinction between committal for contempt and attachment for contempt has been practically abolished.§ But attachment is effected by a writ issued by leave of the Court and directed to the Sheriff, who may accept bail,|| while committal is carried out by the tipstaff, and the contemner could only be bailed

O'Shea, ubi supra, Jud. Act, 1873, s. 100), neither would it necessarily be to answer the matters in an affidavit, or for attachment, see sec. i., *supra*, and cases there cited. Ord. lii., r. 4, does not apply to an application for a writ of sequestration against a corporation; such an application may be made by summons, but if it raises a difficult point requiring argument, it is not wrong to make it by motion. *Selous v. Croydon Local Board*, 1885, 53 L.T. 209. Chitty, J. See Art. IV., § ii. *Seamble*, the motion must be made by counsel; see *Ex parte Pitt*, 1833, 2 Dowl. P.C. 439; *Ex parte Fenn*, 1854, *ib.* 527 (each of those motions against attorneys for misconduct, and the reason being that the application being in the nature of a criminal information, the Court must have the assurance of *bona fides* which it obtains from counsel's appearance). In *Ex parte Daniel O'Connell*, 1839, 3 Jur. 980, a party moved in person against a witness for attachment, and without objection, but his application was refused, and apparently promptly, on other grounds, moreover he was a member of the Irish bar, which seems to the reporter to have made a difference. But the Court here would have no especial control over him, and a barrister moving as a suitor and not as counsel is really moving in person just as much as though he were not a member of the bar.

* *Harvey v. Harvey*, 1884, 26 Ch. D. 644.

† *Piper v. Piper*, W.N., 1876, p. 202; and see *Cone v. Rimell*, 1887, 31 Sol. Jo. 745.

‡ *Callow v. Young*, 1886, 55 L.T. 543; *Ib.* 147; 58 L.J. Ch. 690; W.N., 1886, pp. 183, 209; *Ib.*, 1887, pp. 36, 40.

§ *Harvey v. Harvey*, at p. 654, *per* Chitty, J.

|| *Buist v. Bridge*, 1880, 43 L.T. 432; 29 W.R. 117, Jessel, M.R.

upon a *habeas*.* It is submitted that an amendment should but grudgingly be allowed in a criminal matter affecting the liberty of the subject,† and, at any rate, where an order has been made on notice of motion for leave to issue a writ of attachment, the Court will not afterwards accede to an *ex parte* application to alter the order to one of committal.‡ However, in a recent case Stirling, J., expressed an opinion that there was sufficient difference between attachment and committal to make the practice rules and cases as to one inapplicable to the other.§

Whether the application is for attachment or for committal, it should be made by motion in open Court.|| If the procedure by summons is adopted (but it should not be),|| the summons cannot be heard by a Master in the Queen's Bench Division, or by a Registrar in the Probate Division,¶ and in the Chancery Division should be adjourned into Court.||

Except [perhaps] where according to the old practice a rule for an attachment might have been made absolute *ex parte* in the first instance,** a motion for a writ of attachment cannot be made without previous notice to the parties affected thereby.††

* *Reg. v. County Court Judge of Lambeth*, 1888, 36 W.R. 475.

† Initial para., *supra*.

‡ *Buist v. Bridge*, 1880, 43 L.T. 432; 29 W.R. 117. Jessel, M.R.

§ *Nelson v. Worssam*, 1890, W.N., 1890, p. 216; 35 Sol. Jo. 87. This expression of opinion is not directly reported; but I was of counsel in the cause and on the motion. See also *Mander v. Falcke*, L.R. [1891] 3 Ch. 488.

|| *Davis v. Galmoye*, 1888, 39 Ch. D. 322, C.A. If the C.A. had considered the order below made without jurisdiction it would have been reversed, S.C. 1889, 40 *ib.* 355, North, J. But the C.A. held that as the objection to the jurisdiction had not been taken below, the defendant was not entitled to raise it on appeal. See also *Kenyon v. Eastwood*, 1888, 57 L.J. Q.B. 455; 4 T.L.R. 451; *In re B—*, W.N., 1892, p. 4.

¶ Ord. liv., r. 12.

** See note, *supra*.

†† Ord. lii., r. 3. See *Abud v. Riches*, 1876, 2 Ch. D. 528; *Eynde v. Gould*, 1882, 9 Q.B.D. 335.

The notice of motion, whether for attachment or committal,* should state in general terms the grounds of the application, specifying by name the person complained of, and the manner in which the offence was committed.†

When the party has a solicitor on the record, it has been held that service on the solicitor of notice of motion for attachment is sufficient, for when there is a difficulty about personal service of the notice, and the original order has been personally served, the Court would do wrong to refuse to act on proof of service on the solicitor in the ordinary form. Leaving the notice at the residence of a solicitor disobeying an order is good service.‡ When the defendant has not entered an appearance, the writ and statement of claim have been filed, the order for payment into Court personally served on the defendant, and the notice of motion filed, filing the notice of motion is sufficient notice to the party against whom the attachment is to be issued, a trustee disobeying an order to pay money into Court.§ But when the attachment is asked against some one not a party to the action, then, and in every case of a criminal

* *Litchfield v. Jones*, 1883, 25 Ch. D. 64; *Ex parte Van Sandau*, 14 L.J., Bk. 9, 13.

† Ord. lii., r. 4, R.S.C., Append. B., No. 18; Dan. F. No. 1014; and see *Dean v. Wilson*, 1878, 10 Ch. D. 136 (injunction to restrain threatened contempt); *General Exchange Bank v. Horner*, W.N., 1868, p. 259 (comment by publication); *Plating Co. v. Farquharson*, 1881, 17 Ch. D. 51 (motion before C.A.—advertisement); *Petty v. Daniel*, 1886, 34 Ch. D. 172, 176 (place—"Royal Courts of Justice"); *O'Shea v. O'Shea, Ex parte O'Malley (Star)*, reference to contents placard not gone into because not included in notice, *Times*, 22nd Jan., 1890, Butt, J.; S.C. *Ex parte Tuohy (Freeman's Journal)* (no name in notice of motion), *Times*, loc. cit.; see S.C. 15 P.D. 59 C.A.

‡ *Richards v. Kitchen*, 1877, 36 L.T. 730; *Browning v. Sabin*, 1877, 5 Ch. D. 511; *In re a Solicitor*, 1880, 14 ib. 152; *Mann v. Perry*, 1881, 50 L.J. Ch. 251; 44 L.T. 248; *Howarth v. Howarth*, 1886, 11 P.D. 95; *Petty v. Daniel*, 1886, 34 Ch. D. 172; *Mullens v. Williamson*, 1826, 2 Mol. 380; *Weston v. Faulkener*, 1815, 2 Price 2; A.P. note to Ord., xliv., r. 2.

§ *In re Morris. Morris v. Fowler*, 1890, 44 Ch. D. 151.

contempt, such as considered here, the notice must be personally served, unless personal service is shewn to be impossible, when the Court will find means of reaching the person or party avoiding service.*

If an objection can be relied on without appearing, and the respondent appears in person or by counsel, and consents to an adjournment, the objection for want of personal service is thereby waived.† It has been said that if the notice is so obviously bad that it cannot be cured, the respondent need not appear. But that which is obviously bad and incurable to the minds of some learned Judges may seem quite otherwise to other learned Judges.‡

* *Howarth v. Howarth*, at p. 99; *Smalt v. Whitmill*, 1741, 2 Str. 1054; *Angerstein v. Hunt*, *ubi supra*; *Ellerton v. Thirsk*, 1820, 1 J. & W. 376; *Nelson v. Worssam*, W.N., 1890, p. 216; 35 Sol. Jo. 87; *Mander v. Falcke*, L.R. [1891] 3 Ch. 488; *Jonas v. Long*, 1887, 31 Sol. Jo. 717 (service by registered letter); *Whyte-Melville v. Whyte-Melville*, 1888, 4 T.L.R. 491. See also *Callow v. Young*, *ubi supra* (note (s)); *Gordon v. Woods*. In *re Luxmore*, W.N., 1888, p. 63 (interference with receiver by party having liberty to attend). But see *In re Davis*, W.N., 1887, p. 252, which, however, is a note, and not a report. Where by reason of the ferocious and terrible nature of the person complained of no one was willing to hazard serving him, leaving the order for a rule *nisi* at his house was to be deemed a good service, and the order was afterwards made absolute upon an affidavit of service by throwing it into his dwelling-house. *Williams v. Johns*, 1773, 2 Dick. 477; 1 Mer. 303n. Lord Bathurst, L.C. Substituted service, *In re a Solicitor*, W.N., 1892, p. 22. Note, a proceeding for a criminal contempt as here considered not being a proceeding in the action (*O'Shea v. O'Shea*, *Ex parte Tuohy*, 1890, 15 P.D. 59), the offender, even if a party, has not any solicitor upon the record as to such a proceeding, only because he had such a solicitor in the action.

† *Ex parte Alcock*, 1875, 1 C.P.D. 68. And see *Boyle v. Sacker*, 1888, 39 Ch. D. 249; *Fry v. Moore*, 1889, 23 Q.B.D. 395; *Re Parisot*, 1889, 5 T.L.R. 344; *Jennings v. Simpson*, 1838, 2 Jur. 28.

‡ *Daubeny v. Shuttleworth*, 1876, 1 Ex. D. 53; *Mauilin v. Rogers*, 1886, 34 W.R. 592; W.N., 1886, p. 104; *Williams v. De Boinville*, 1886, 17 Q.B.D. 181; *In re Coulton*, 1886, 34 Ch. D. 22. Note that in Ch. D. a motion is not in any list, and, therefore, without more, a notice for a wrong day may seriously prejudice the respondent.

There is no jurisdiction to serve the notice out of the jurisdiction.* If there were any such jurisdiction, there would be no jurisdiction, in such a case, to commit the person complained of without hearing him.† Where a wife is living separate from her husband, and abroad, though she has appeared jointly with him in all proceedings in the cause, a notice of motion to commit for contempt should be served on her personally, and substituted service ought not to be ordered.‡

Unless the Court or a Judge give special leave to the contrary, there must be at least two clear days between the service of a notice of motion and the day named in the notice for hearing the motion, provided that in applications to answer the matters in an affidavit, or to strike off the rolls,§ the notice of motion shall be served on the parties not less than ten clear days before the time fixed by the notice for making the motion.||

A copy of any affidavit intended to be used, must be served with the notice of motion for attachment, or for committal where attachment is the prescribed remedy.¶ If this rule is not complied with, there is an irregularity. But the irregularity is within Order lxx., r. 1, under which the

* See *O'Shea v. O'Shea* (*Freeman's Journal*), *Times*, 19th Feb., 1890, Butt, J. (service at Dublin); Sc. C.S. & O., pp. 308, *et seq.*; *Dubout v. Macpherson*, 1889, 23 Q.B.D. 340.

† *Ex parte Wyatt*, 1836, 5 Dowl. P.C. 389; *Whittle v. M'Donald*, 1827, 2 Mol. 401. But see *Broad v. Wickham*, 1831, 4 Sim. 511.

‡ *Hope v. Carnegie*, 1868, L.R. 7 Eq. 254; S.C. *ib.* 263.

§ See Note I. to Art. IV. (ii.)

|| Ord. lii., r. 5; as to short notice, see further A.P. note to this rule, and *Mootham v. Waskett*, 1816, 1 Mer. 343.

¶ Ord. lii., r. 4; *Litchfield v. Jones*, 1883, 25 Ch. D. 64. As to writ of sequestration against a corporation, see *Selous v. Croydon Local Board*, 1885, 53 L.T. 209, cited in a note to this section, *supra*. Whether the rule extends to exhibits *qu.*; but if the not serving copy exhibits is an irregularity, it is condoned where the respondent has seen the exhibits, and dealt with them in reply. *Re Hutchings*, W.N., 1887, p. 254.

Court has condoned the irregularity, where the affidavit in support of a motion for attachment was not served with the notice of motion, but was served two clear days before the day named in the notice of motion as the day on which the Court would be moved; where the affidavit was not served with the notice but the day after; and where the notice of motion was served in one place, being the address for service, and the affidavits were served at the office of the country solicitor, which was not the proper address for service; but in this last case, the Court, in its discretion, in consideration of the irregularity, ordered the release of the prisoner, who had been taken under the attachment, making no order for costs against the plaintiff.*

If the respondent does not appear, an order for committal may be made on affidavit of service of notice of motion.†

In the case of an application for attachment, a rule of the Probate Division requires that affidavits such as inform the Court of the nature of the contempt complained of, and the documents, for instance, newspapers, referred to in those affidavits, should be filed in the registry before the motion is opened. If this rule is not complied with, as

* *Hampden v. Wallis*, 1884, 26 Ch. D. 746; *In re Wyggeston Arbitration*, 1885, 33 W.R. 551; *Petty v. Daniel*, 1886, 34 Ch. D. 172.

† *Broad v. Wickham*, 1831, 4 Sim. 511. It has been held by Pearson, J., in applications to commit for disobeying an order, that it is not necessary to serve with the notice of motion a copy of the affidavit of the service on the defendant of the original order. *In re Whitham*, W.N., 1885, p. 176; *Schirges v. Schirges*, *ib.*, 1886, p. 85. It is generally necessary, however, to read such an affidavit on the hearing of the motion, and in a later case, where it was stated in the notice that the plaintiff intended to read the affidavit, but a copy was not served with the notice, North, J., declined to follow these earlier rulings, being unwilling to make an order for attachment against a defendant who might have abstained from appearing in reliance on the irregularity. *Re Lysaght*, W.N., 1887, p. 23. See *Evans v. Evans*, 1888, 33 Sol. Jo. 721, Denman, J. (order discharged); *Wadham v. Lempriere*, 1885, 29 *ib.* 725, Smith, J.; *Plant v. Nevitt*, 1886, 30 *ib.* 704, Chitty, J. (liberty to reserve notice with affidavits); *In re Morris*, *Morris v. Fowler*, 1890, 44 Ch. D. 151.

when the newspapers referred to were not sent into the registry, the motion should be dismissed with costs.*

The motion is only properly opened on a motion day.†

It is the duty of the Court to look into all the affidavits and see on which side the truth lies, and the Court may commit the offender though he positively and circumstantially denies the offence.‡

If the contempt complained of is an assault in relation to business at the Courts, the place where the alleged assault took place should be exactly stated.§

Lord Eldon, L.C., once declined to commit upon a foreign affidavit, the reason being that perjury could not be assigned.|| But this objection would not apply to an affidavit made under the Commissioners for Oaths Act, 1889.¶

Where the contempt was evidenced by the sheriff's return of a caption and rescue no affidavit was necessary, but then the first step was to bring the party to the bar to shew cause.**

* *O'Shea v. O'Shea* (*Star, Freeman's Journal, New York Herald, Times*, 15th Jan., 1890, Butt, J.; see Ord. lxviii., r. 1, and the Books on Divorce.

† *Saxby v. Saxby*, 1834, 7 Sim. 140 (Seal Day), and such was the practice of Jessel, M.R., Dan. Ch. P., 1624. The report of *Saxby v. Saxby*, was stated at the bar in *Harborough v. Wartnaby*, 1844, 1 Ph. 364, to have been questioned by the V.C.

‡ *Emery v. Bowen*, 1836, 5 L.J. (N.S.) Ch. 349 (assault on process-server). At a time when the oath of the complainant was the ground of the arrest, two witnesses were, apparently, required to prove a contempt. But this rule was not always adhered to. *Anon.*, 1745, 3 Atk. 219 (beating process-server); *Sands v. Knighton*, 1638, Toth. 41; *Blake v. D'Arcy*, 1828, 3 Mol. 352 (process-server); *Ex parte Clarke*, 1830, 1 Ru. & My. 563; *Blackwell v. Tatlow*, 1834, 3 My. & R. 321; 3 L.J. (N.S.) Ch. 153. As to *Wade v. Broughton*, 1814, 3 Ves. & B. 172 (comparison of handwriting), see now St. Dig. Ev., Art. 52.

§ *Kirby v. Webb*, 1887, 3 T.L.R. 763.

|| *Musgrave v. Medex*, 1816, 19 Ves. 652.

¶ 52 Vict., c. 10, s. 7.

** *Blackwell v. Tatlow*, 1834, 2 My. & K. 321.

The respondent is entitled to see an affidavit in reply before it is read,* and it is not necessary that his affidavit should negative charges which are not suggested by the affidavits on the other side.†

If the contempt is clear the respondent should, by affidavit, express regret and propitiate the justice of the Court, and it is, in any case, advisable that his affidavit should contain a submission and apology if the Court should be of opinion that a contempt has been committed.‡

When the Court is making an order for the protection of an infant it will, in an urgent case, act upon suspicion without proof, but when a case is brought before the Court for the committal of some person for interfering with a ward, then there must be evidence which would be sufficient in an ordinary action.§

If the question turns upon the meaning of a document, and there is any doubt as to the meaning, the Court, in its discretion, may leave the parties to another remedy, so that the question may be submitted to a jury.||

If a technical contempt is established, but the application is not made *bonâ fide* for committal, but merely to make costs, there should be no order on the motion.¶

A parol order of a superior Court is sufficient as to a contempt in the face of the Court,** but it was long ago said to be the practice in Chancery to award a writ.††

The Court will measure the punishment according to circumstances. If the offender promptly apologises and makes submission to the Court, the order may be that he

* *Dodge v. Brown*, 1879, 24 Sol. Jo. 108. Jessel, M.R.

† *Tichborne v. Mostyn*, 1868, L.R. 7 Eq. 55n, 57.

‡ *Felkin v. Herbert*, 1864, 33 L.J. Ch. 294, 298.

§ *Sumner v. Kingscote*, 1885, 1 T.L.R. 351.

|| *Helmore v. Smith*, 1886, 35 Ch. D. 436, 457. But see Art. I., § i.

¶ *Hunt v. Clarke*, 1889, 58 L.J. Q.B. 490 C.A.

** § vi. (d), (2) *infra*.

†† *Furlong v. Bray*, 1668, 2 Wm. Saund. 182. See § vi. (d), (2), *infra*.

pay the costs, and no order on the motion.* A person filling an official position, as a mayor, may escape imprisonment in view of the inconvenience which might be caused to other persons.† If the offender is a barrister, or a solicitor, or if he was present in Court, and heard a warning from the Bench in regard to the commission of contempts in the same cause, his offence is the worse.‡ A printer or publisher may mitigate his punishment by disclosing the name of the writer.§ The attachment may be ordered to lie in the office until a fresh contempt is committed, the respondent, by his counsel, undertaking not to repeat the offence,|| or, if the contempt is a continuing act, the Court may order the attachment to lie in the office for a specified time, that the respondent may make any application he pleases on affidavit that he has desisted from the contempt.¶ In the case of interference with a process-server, a mere intention to frighten is not so serious as an intention to cause actual harm.**

It is better that the order, even of a superior Court, should be an express adjudication of contempt, and such adjudication, though not essential if the contempt is recited, is usually inserted now in accordance with the opinion expressed by Cottenham, L.C., in *Ex parte Van Sandau*.††

* *Tichborne v. Mostyn*, *ubi supra*, at p. 58. Form of order, *Jackson v. Brighton Aquarium Co.*, W.N., 1872, p. 33; Seton, Vol. II., pt. 2; ch. 17, s. 7.

† *Martin v. Martin*, 1747, 2 Ru. & My. 674, n.

‡ *Skipworth's Case*, 1873, L.R. 9 Q.B. 230; *Ex parte Hayward*. In *re Plant*, 1881, 45 L.T. 326 (order for account of loss incurred to estate by interference with officer in bankruptcy); *cf. Ex parte Dixon*, 1803, 8 Ves. 104 (person ousting bailiff ordered to give security for assets).

§ *Roach v. Garvan*, 1742, 2 Atk. 469; *Re American Exchange in Europe*, 1889, 58 L.J. Ch. 706; 61 L.T. 502. See *Ex parte Green*, 1891, 7 T.L.R. 411.

|| *Sharland v. Sharland*, 1885, 1 T.L.R. 492.

¶ *Butler v. Butler*, 1888, 13 P.D. 73.

** *Bell v. Labouchere*, 1890, *Times*, 1st July, 1890.

†† 1846, 1 De G. 303; 1 Ph. 605; Seton, I., ii., c. 5, s. 20. Early forms of orders as to publication by comment, by interference with a ward, and in the case

§ iii. *Costs.*

The costs of the motion are in the discretion of the Court, and should be asked for at the time of moving.*

If the mover's knowledge informs him that the application is frivolous, the application should be refused with costs.†

When there had been a clear technical contempt by comment and publication, but the party complaining himself, in the first instance, supplied the contemner with

of lady beating process-server are collected in the judgment *Ex parte Van Sandau*—viz., *Roach v. Garvan*, 1742 (Anon. 2 Atk. 469); *Morgan v. Jones*, 1745; *Totherby v. Preston*, 1748; *Re Quick*, 1806 (S.C. *Ex parte Jones*, 13 Ves. 237). As to process-server, *Price v. Hutchinson*, 1869, L.R. 9 Eq. 534, Seton, 11., ii., c. 17, s. 7. Order for fine omitting imprisonment till fine be paid on account of social position of respondent. *Reg. v. Castro*, 1873, L.R. 9 Q.B. 219, 228, 241. Proper order in case of contempt by defendant in pending prosecution, so as not to hamper preparation of defence. *Ib.* Order for committal of editor for publishing article reflecting on witnesses, *Felkin v. Herbert*, Seton, l.c.; 1863, 33 L.J. Ch. 294; 12 W.R. 332. Minutes of order fining publisher and ordering him to pay costs as between solicitor and client, *In re Crown Bank*; *In re O'Malley (Star)*, 1850, 44 Ch. D. 649, 653. Order requiring printing of apology in as legible type and conspicuous a manner as extracts and articles complained of, *General Exchange Bank v. Horner*, Seton, l.c.; W.N., 1868, p. 259. Form of injunction restraining threatened contempt by publication and comment, *Mackett v. Herne Bay Commissioners*, Seton, l., ii., ch. v., s. 9; 1876, 24 W.R. 845, approved *Guilding v. Morel*, 1888, 4 T.L.R. 198. Kay, J. Interference with goods in possession of receiver, *Cooper v. Asprey*, 1863, 33 L.J. Q.B. 209, with receiver of rents, *Marsh v. Goodall*, 1857; Seton, l., ii., c. 17, s. 7, with receiver by sheriff, *Russell v. East Anglian Co.*, 1850, 3 M'N. & G. 104. Committal of sheriff for not returning writ, Dan. Ch. F., No. 1016. Order as to contempt by fabricating fictitious case to obtain the opinion of the Court, *Re Elsam*, 1824, 3 L.J. K.B. 75. Further generally, Seton, *Tit. Contempt*; Oswald on *Contempt of Court*; Anderson on the *Law of Execution*, i.; Attachment and Committal; Edwards, *ib.*

* Ord. lxx., r. 1; *Abud v. Riches*, 1876, 2 Ch. D. 528. The Chancery practice before the Jud. Acts allowed the motion to be refused without costs, *Hope v. Carnegie*, 1869, L.R. 4 Ch. 264.

† *Rex v. Plunket*, 1762, 3 Burr. 1329 (application against witness for non-attendance on *subpœna* by plaintiff not performing promise to let him know if he were wanted).

information and material for the comment, Bacon, V.C., made no order on the motion and no costs; * and that is the proper course where there is a technical contempt, but the application is only to make costs; † or where the person moved against has received provocation, as by the conduct of a process-server, and his conduct has been blameworthy, but not criminal, the motion may be dismissed without costs. ‡ Though where the party took forcible possession of a bankrupt's property in the control of a messenger, under a mistaken notion of right, and upon being shortly convinced of his error gave up the property to the messenger, he was ordered to pay the costs of a petition to commit. §

Costs as between solicitor and client are sometimes given to the party moving, in lieu of committing the respondent, or in addition to a fine. It is doubtful if, in any case, such costs could be given to a respondent. ||

The costs of an affidavit filed on a motion to restrain intercourse with a ward, and used on a motion to commit in attempting to marry the ward, are costs "occasioned by the contempt." ¶

Where the respondent was ordered to stand committed and pay the costs, charges and expenses of the petitioners

* *Vernon v. Vernon*, 1870, 40 L.J. Ch. 118; 23 L.T. 696; 19 W.R. 404.

† *Hunt v. Clarke*, 1889, 58 L.J. Q.B. 490.

‡ *Oppert v. Dadelsein*, *Times*, 4 Aug., 1890; report corrected, *ib.*, 5 Aug., 1890.

§ *Ex parte Fletcher*. *In re Proud*, 1841, 2 M.D. & De G. 129.

|| *Steele v. Hutchings*, W.N., 1879, p. 18; *Tilney v. Stansfield*, 1880, 28 W.R. 582; *Plating Co. v. Farquharson*, 1881, 17 Ch. D. 49, 57; *Peters v. Bradlaugh*, 1888, 4 T.L.R. 414; *O'Shea v. O'Shea*, *Ex parte Tuohy*, 1890, 15 P.D. 59; *Bell v. Labouchere*, 1890, *Times*, 1st July, 1890; *In re Crown Bank*; *In re O'Malley (Star)*, 1890, 44 Ch. D. 649. *Ex parte Green*, 1891, 7 T.L.R. 411. The doubt is expressed in *Plating Co. v. Farquharson*, but see *Andrews v. Barnes*, 1887-8, 39 Ch. D. 133, and Judicature Act, 1890 (53 & 54 Vict., c. 44), s. 5.

¶ *Thornhill v. Thornhill*, 1855, 23 L.T. 36; 3 W.R. 151.

incurred in the application, Lord Cottenham, L.C., reviewing the order, directed it to be varied by striking out the words "charges and expenses." *

§ iv. *Execution and Arrest.*

The process of execution† must be strictly complied with, or the arrest will be irregular.‡ Where the writ is ordered to lie in the office for a certain time, it is usual to issue the writ and leave it in the office until the expiration of the time.‡

A criminal contempt being in the nature of a breach of the peace, the arrest may be effected on a

* *Ex parte Van Sandau*, 1846, 1 Ph. 605; 1 De G. 303. If the person were committed it was a rule of convenience that the order should be silent as to costs, which were afterwards ordered to be paid as a condition of the discharge. *Ib.* See now § vi. (a), (1), *infra*.

† It may be convenient to mention that arrest under attachment for contempt is not the same as an execution in satisfaction, and does not deprive a judgment creditor of his remedy against the property of the debtor. *Roberts v. Ball*, 1855, 3 Sm. & G. 168; Ord. xlv., r. 1.

‡ *Ex parte Van Sandau*, 1846, 1 De G. 303. Notice to the Sheriff, etc., Ord. liv., rr. 11, 12, Official Requirements, A.P., Part V. The attachment had to be entered in the Registrar's Book before it issued, *Smith v. Thompson*, 1819, 4 Mad. 179; see also *James v. Philips*, 1731, 2 P. Wms. 657; *Davenport v. Davenport*, 1842, 11 L.J. Ch. 325. *Recommittal.* *Held*, in Ireland, that where party arrested under attachment discharged by mistake of sheriff, writ can only be renewed after notice, if at all, *Cunningham v. McCambie*, 1837, Sau. & Sc. 427, and see *Knott v. Coitree*, 1854, 19 Beav. 470. *Semble*, the writ may be renewed so long as order is undischarged and disobeyed, *Smith v. Stickwood*, 1842, 11 L.J. Ch. 109; *Wenham v. Bowman*, 1848, 17 *ib.* 479. Person adjudged guilty of criminal contempt and fined persisting in conduct thereafter is liable to further punishment, *Re Muloek*, 1864, 33 L.J. P. 205; but this would really be for another offence, and there should be a second adjudication, *In re Pollard*, 1868, L.R. 2 P.C. 106. Under the old practice, a party might abandon an unexecuted writ of attachment and sue out a new one, but it was imperative upon him, and at his peril, either to withdraw or otherwise take care that no further proceedings were taken under the first attachment, *Andrews v. Walton*, 1845, 1 Ph. 619. See also *Lewis v. John*, 1835, 7 L.J. Ch. (N.S.) 300; *Morris v. Smith*, 1837, 8 Sim. 33 (escape—second order—serjeant-at-arms).

Sunday,* and the sheriff, or a sequestrator, can break open outer doors.†

Any person imprisoned under any rule, order, or attachment for contempt of any Court is treated as first-class misdemeanant.‡ Contempt prisoners of the High Court are confined in Holloway.§

§ v. *Rights of and Proceedings by Party in Contempt.*

The general rule, founded upon Lord Bacon's Ordinance of January, 1618, construed from the practice which has existed since Lord Bacon's time, is "they that are in contempt are not to be heard."|| The only reported cases I am aware of, in which persons adjudged guilty of the contempts dealt with in the preceding Articles¶ have been heard, are where such persons have been seeking, in one way or another, to obtain their discharge.**

§ vi. *Discharge and Clearing.*

(a.) *Purging Contempt.*

(i.) *Generally.*

The application to discharge a prisoner is made to the Court by motion,†† of which notice should be given to any

* *Ex parte Whitechurch*, 1749, 1 Atk. 55; cf. *Rex v. Myers*, 1786, 1 T.R. 265.

† *Harvey v. Harvey*, 1884, 26 Ch. D. 644.

‡ Prisons Act, 1865 (28 & 29 Vict., c. 126); Prison Act, 1877 (40 & 41 Vict., c. 21), s. 41; Dan. Ch. Pr. i., p. 902. As to County Court prisons, see County Courts Act, 1888 (51 & 52 Vict., c. 43).

§ *Ib.* It is clear that no attachment for contempt as here considered is an "attachment for debt" within the meaning of the Sheriffs Act, 1887 (50 & 51 Vict., c. 55), s. 14 (1), *Mitchell v. Simpson*, 1890, 25 Q.B.D. 183.

|| *Roper v. Roper*, 1688, 2 Vern. 91; *Wenman v. Osbaldiston*, 1719, 2 Bro. P.C. 276; *Vowles v. Young*, 1803, 9 Ves. 172, 173; *Wilson v. Bates*, 1838, 7 L.J. (N.S.) Ch. 131; *Church v. Cremer*, 1846, 1 Coop. t. C. 205.

¶ Art. I., § i.

** § vi., *infra*.

†† Notice of motion, Dan F., No. 1021. Lord Eldon required a petition, *Nicholson v. Squire*, 1809, 16 Ves. 259. The application is occasionally made by summons, A.P. note to Ord. xlv., r. i.

party with an adverse interest,* but the cause of punishment being a contempt of the authority of the Court, and not proceeding upon the ground of any damage sustained by an individual, the Court has power to order a prisoner's discharge if of opinion that the measure of his punishment is adequate to the degree of his offence, though the other party object; does not require apology to the person or party aggrieved, but apology and submission to the Court, and may, of its own motion, order a prisoner to be brought before it, and his release upon terms.†

Counsel moving for the release of a person in custody for contempt has priority as of right, and may move at the commencement of the day.‡ It is a proper practice to allow a motion for release to take precedence of all others. Such a motion should be taken at once.§

If a condition of discharge is mentioned in the order, the person applying to be discharged should be able to shew that he has exactly performed the condition,|| but the Court would have jurisdiction to discharge such an one in a proper case, the condition remaining uncomplished with.¶

A person is sometimes discharged on an undertaking to restore the *status quo*.**

In the case of a contempt by advertisement relating to a pending cause, Lord Hardwicke discharged the publisher

* *Ex parte White. Re Scrivener*, 1832, 1 Dea. & Ch. 39; *Wenman v. Osbaldiston*, 1719, 2 Bro. P.C. 276.

† *Barrow v. Humphreys*, 1820, 3 B. & Ald. 598, 600; *Adlard v. Smith*, 1819, 6 Price 321; *Felkin v. Herbert*, 1864, 33 L.J. Ch. 294, 299, 300; *In re Davies*, 1888, 21 Q.B.D. 236, *q.v.* for order discharging contumacious prisoner but protecting plaintiff.

‡ *Ashton v. Shorrocks*, 1880, 29 W.R. 117. Jessel, M.R.

§ S.C. 43 L.T. 430.

|| *Reg. v. Weston*, 1844, 8 Jur. 1122.

¶ *Adlard v. Smith*, *ubi supra*, distinguished from *In re Davies*, *ubi supra*, in that in latter case party was not unable but unwilling to obey.

** See *Scully v. Skehane*, 1840, Sau. & Sc. 710; *cf. Butler v. Butler*, 1888, 13 P.D. 73.

on submission and disclosing at whose instance the advertisement had been inserted.*

The affidavit of the offender should disclaim any intention to have interfered with the course of justice and express regret, or otherwise as the case may be.†

If the Court is satisfied, the prisoner will be discharged, or the attachment, if lying in the office, rescinded, or a fine still unpaid not estreated.‡

The offender is usually ordered to pay the costs occasioned by his contempt, and the costs of the application to discharge him, and where an attachment is rescinded, or fine ordered not to be estreated, this should be on payment of costs.§ Since the Debtors Act, 1869, there is no jurisdiction (except in the case of an officer of the Court) to commit for the non-payment of costs ordered to be paid as costs of motion to commit.¶ But when the order is that on paying or giving security for costs when taxed prisoner shall be discharged, the Act has no application, and the prisoner is not entitled to be discharged till payment or security.|| It is the practice in the Queen's Bench Division to make the contemner pay the costs of his contempt before getting his discharge.¶¶ The undertaking of the solicitors may be taken instead of actual payment by the party;** in place of the condition that the

* *Cann v. Cann (Mrs. Farley's Case, Case of the Bristol Journal)*, 1754, 2 Ves. Sen. 520; 3 Hare 333n.

† See *Felkin v. Herbert*, *ubi supra*; *Brodribb v. Brodribb*, 1886, 11 P.D. 66; *Re Mulock*, 1864, 33 L.J. P. 207; *Price v. Hutchinson*, 1870, Seton, 1594, L.R. 9 Eq. 534, 537 (order of discharge when contempt condoned).

‡ *Adlard v. Smith*, *ubi supra*, and cases cited preceding note.

§ *Micklethwaite v. Fletcher*, 1879, 27 W.R. 793, Jessel, M.R. (explaining *Harvey v. Hall*, 1870, L.R. 11 Eq. 31); *Jackson v. Mawby*, 1875, 1 Ch. D. 86; *Weldon v. Weldon*, 1885, 10 P.D. 72.

|| *In re M—*, 1876, 46 L.J. Ch. 24; S.C. *nom.* S. v. L., W.N., 1879, p. 220.

¶ *Clark v. Dyson*, 1882, 26 Sol. Jo. 131.

** *Britnell v. Walton*, 1870, 18 W.R. 446. But as to Ch. D. see *Re Jarvis*, *Jarvis v. Ward*, W.N., 1886, p. 118 (defaulting trustee).

costs should be first taxed, the contemner may have the alternative of paying a sum to be named to the complaining party, subject to the taxation, and then he may be discharged instanter; * or the Court may make an immediate order for the discharge of the prisoner, upon his paying, by way of deposit, a named sum towards the expenses incurred in respect of the proceedings, the costs to be taxed, the prisoner undertaking to pay what more might be found due from him, and the persons receiving the sum to return any surplus there might be.†

If it is by statute imperative upon the gaoler, in the circumstances, to discharge the prisoner, he will expose himself to an action upon not discharging the prisoner at the end of the time specified therein.‡ But where the gaoler merely obeys the writ, he will be protected by the exigency of the writ,§ and, it would seem, that in every case where the order does not itself inform the gaoler of the expiration of the time, it is necessary to come to the Court for a discharge.||

(2.) *Wards.*

The power which the Court possesses of committing for contempt enables it, by imposing the execution of a settlement approved by itself as a condition of discharge, to compel a person who has married a ward without leave to renounce rights in the ward's property arising upon the marriage to any and such extent as the Court thinks proper to call upon the person to do. Where there has been a marriage of a female ward without leave, the general rule is that the husband shall not take any interest in the wife's property

* *Felkin v. Herbert*, *ubi supra*.

† *Price v. Hutchinson*, *ubi supra*.

‡ *Moone v. Rose*, 1869, L.R. 4 Q.B. 486.

§ *Greaves v. Keene*, 1879, 4 Ex. D. 73.

|| *Re Thompson*; *Nalty v. Aylett*, 1874, 30 L.T. 783; *Re Edwards*; *Brooke v. Edwards*, 1882, 21 Ch. D. 230.

under the settlement, but, unless the circumstances make the contempt very flagitious (when it might be proper to exclude the husband entirely), the Court will not deprive the wife of the power of appointing to the husband in default of issue,* and, on the other hand, where there is matter of alleviation, as actual ignorance of the wardship,† or encouragement on the part of the ward's family,‡ the Court may sanction a power in the wife to appoint to the husband for life in postponement of the remainder to the children.§ Where a male ward had been married without leave, Sir Edward Sugden, L.C. Ir., refused to make an order that he should settle his property, which was realty, upon himself to the exclusion of his wife; || and it is the law that, although an infant ward marrying without leave is guilty of contempt, for which he might be sent to prison, the Court has no jurisdiction to order him to make a settlement, and so to deprive him of his own property,—a very different thing from allowing a person who had acquired rights in the property of another by an act of contempt to purge himself on depriving himself of such rights.¶ It would seem to follow that at the present time a wife also may refuse to execute a settlement of her own property.**

* *Ball v. Coutts*, 1812-13, 1 V. & B. 300, Lord Eldon, L.C.; *Kent v. Burgess*, 1840, 11 Si. 361; *In re Sampson & Wall*, 1883, 25 Ch. D. 482, C.A.

† *Wilkinson v. Foughin*, 1872, 41 L.J. Ch. 234. S.C. *Wilkinson v. Jenkins*, W.N., 1872, p. 5.

‡ *Stevens v. Savage*, 1790, 1 Ves. 154. Lord Thurlow, L.C.

§ *Wilkinson v. Foughin*, *supra*; *Re Walker*, 1835, L. & G. t. Sugden, 299; *Ib. t.* Plunkett, 136. S.C. *Hodgens v. Hodgens*, 1837, 4 Cl. & F. 323; *Richardson v. Merrifield*, 1850, 4 D.G. & S. 161.

|| *Re Murray*, 1842, 3 Dr. & War. 83.

¶ *In re Leigh*; *Leigh v. Leigh*, 1888, 40 Ch. D. 290, C.A.; *Seaton v. Seaton*, 1888, 13 App. Cas. 61.

** M.W.P.A., 1882. See *In re Sampson v. Wall*, *ubi supra*. See further generally, *Hill v. Turner*, 1737, 1 Atk. 515; *Birkett v. Hibbert*, 1834, 3 My. & K. 227; *Baseley v. Baseley*, 1818, 4 Cl. & F. 378 N.; *Martin v. Foster*,

Upon the application for release all the circumstances will be considered, for instance, the Court will not disregard the fact that, by reason of the contempt, the husband has been struck out of the Commission of the Peace and deprived of precedence at the bar,* or that the marriage would have been a proper one but for the contempt.† Yet this offence is a grave one, and the imprisonment no matter of a day or two.‡

Before the Court releases the contemner it will see that a valid marriage has been celebrated.§

Where the husband had been in prison for some time he was not kept in custody until the costs were taxed,|| and where the husband had no property, and had married the infant in ignorance of the wardship and not under circumstances of aggravation, the costs of the husband, as well as of the other parties, were allowed out of the fund.¶

(b.) *Pardon.*

A Criminal contempt, since it ends only in the punishment of the offender, and not in relieving or redressing the prosecutor, is within an Act of pardon, though the Act

1855, 7 D.G.M. & G. 98; *Gynn v. Gillard*, 1860, 1 Dr. & Sm. 356; *Cave v. Cave*, 1852, 15 Beav. 227 (marriage in Scotland—lapse of time); *Winch v. James*, 1798, 4 Ves. 386; *Chassaring v. Parsonage*, 1799, 5 Ves. 15 (very aggravated contempt—seduction and cohabitation); *Wells v. Price*, 1800, 9 Ves. 398; *Millet v. Rose*, 1802, 7 ib. 419; *Pearce v. Crutchfield*, 1809, 16 ib. 48 (liberty to husband to attend taking of accounts in the suit refused by Lord Eldon, L.C.); Seton, II., i., c. xxi., s. vii.; *In re Phillips*, 1887, 34 Ch. D. 467 (Infants' Settlement Act).

* *Butler v. Freeman*, 1736, Ambl. 301.

† *Ball v. Coutts*, 1812-13, 1 V. & B. 300.

‡ *In re Sampson v. Wall ubi supra* (very nearly six months). See also *Scott v. Padwick*, 1888, 4 T.L.R. 569 (communication with ward).

§ *Bathurst v. Murray*, 1801-2, 8 Ves. 74; *Cox v. Bennett*, 1874, 22 W.R. 819; W.N., 1874, p. 146.

|| *Cox v. Bennett, ubi supra*.

¶ Anon., 1828, 4 Russ. 473. See *De Stackpoole v. De Stackpoole*, 1887, 37 Ch. D. 139.

contain an exception "of all contempts and offences for which a prosecution was then depending, and which had been prosecuted at the charge of any private person or persons."* A contempt having been discharged by a general pardon, or, *semble*, by a particular pardon, the contemner stands *rectus in curia*.†

(c.) *Appeal.*

No appeal lies from any judgment of the High Court in the matter of a Criminal contempt, save for some error of law apparent upon the record, as to which no question shall have been reserved for the Court for the consideration of Crown Cases Reserved.‡ Contempt by publication and comment is a criminal contempt in this relation,‡ as, probably, are all contempts here considered.§ But where the act complained of, for instance, the obstruction of a receiver, arises out of a misunderstanding as to the meaning of an order, and the real question raised is as to the rights of the parties under the order, it may possibly be that an appeal can be taken.||

* *Phipps v. Anglesea*, 1721, 1 P. Wms. 696.

† Anon., 1674, 1 Ch. Ca. 238. But when the process of contempt is in the nature of an execution, the pardon, though it discharge the contempt, does not exonerate from the debt. *Bartram v. Dannett*, 1676, Finch, 253. See further generally, Note I. (ii.) to Art. IV. The two cases cited in this present Note were upon the Act of Indemnity passed at the Restoration.

‡ Jud. Act, 1873, s. 47; *O'Shea v. O'Shea & Parnell*; *Ex parte Tuohy*, 1890, 15 P.D. 59 C.A.

§ Art. I., sec. i.

|| See *Farmain v. Chatterton*, 1882, 20 Ch. D. 493 C.A. Appeals from interlocutory orders in applications relating to matters of contempt are set down in a separate list. A.P. Note to Ord. lviii., r. 8. As the decisions of the C.A. on appeals in matters of criminal contempt have been without jurisdiction, are they of authority save as expressions of opinion entitled to great respect? As to the record, see § ii.; above (d), (2), *infra*. By virtue of sect. 104, subsect. (2), of the Bankruptcy Act, 1883, there is an appeal against a committal order in Bankruptcy for wilful disobedience. *In re Ashwin*, 1890, 25 Q.B.D. 271.

Where there is an appeal, as from an order of a County Court to the High Court,* or from a Municipal Election Court,† the Court above will not interfere unless there is no reasonable evidence on which the Court below could have come to the conclusion that a contempt had been committed, or the order was made without jurisdiction,‡ or the punishment is unusual or extraordinary.§

(d.) *Irregularity.*

(1.) *Application to Discharge.*

Non-compliance with the rules does not necessarily render any proceedings void, and an application to set aside any proceeding for irregularity, must be made within reasonable time, and before the party applying has taken any fresh step after knowledge of the irregularity.||

In cases of contempt by disobedience, the writ of attachment has, upon motion, been discharged, without costs, upon the ground of a difference between the title of the order disobeyed and the title of the affidavit of the service

But an order made by the Court in Bankruptcy in relation to criminal contempts as here considered (see Introduction) would not be made in a bankruptcy matter (*O'Shea v. O'Shea*, *ubi supra*), and it is submitted that the general words of the section are not to be construed to alter the Common Law in this respect. *Cf. Bell Cox v. Hakes*, 1890, 15 App. Cas. 506.

* County Courts Act, 1888 (51 & 52 Vict., c. 43), s. 120.

† Art. IV., § ii. (f).

‡ *Reg. v. County Court Judge of Lambeth*, 1888, 36 W.R. 475; *Reg. v. Jordan*, 1888, *ib.* 797, affirmed 57 L.J. Q.B. 483; W.N., 1888, p. 152.

§ See Art. I., § i.; Art. IV., § i.; Note I. to Art. IV.

|| Ord. lxx., rr. 1 & 2; Ord. xii. and notes in A.P.; Dan. Pr., p. 907; *Petty v. Daniel*, 1886, 34 Ch. D. 172; see initial paragraph of this Article. Application to discharge process of contempt. Dan. F., No. 1022; § v., *supra*; (a) *supra*. The older Chancery rule was, that if a party in custody once had a right to his discharge, he had neither power nor capacity to waive his right. But where the party was not in custody, and his object was merely to set aside proceedings founded on the attachment, there could be a waiver of an irregularity in the attachment for the purpose of sustaining those proceedings, *Haynes v. Ball*, 1841, 4 Beav. 101; *Needham v. Needham*, 1846, 1 Ph. 640.

of the order, the reason being that the affidavit was irregular, and the possibility that there might have been service of some other order.* Where the irregularity consisted in not serving with the notice of motion for attachment copies of the affidavit intended to be used, Kay, J., refused to set aside the order, and made no order for costs as against the plaintiff, but released the prisoner.†

Where an application is made to set aside proceedings for irregularity, the several objections intended to be insisted on are to be stated in the summons, or notice of motion,‡ and where the application was that the order and writ of attachment might be set aside on a ground specified, "and on other grounds sufficient to avoid the said order," it was said that the ground specified was the only objection stated in the notice of motion, and that the applicant could not properly rely on other objections taken at the bar.‡

When a summons is taken out to set aside any process or proceeding for irregularity with costs, and the summons is dismissed generally without any special directions as to costs, it is understood as dismissed with costs.§

Notwithstanding an offer to pay all expenses incurred by the defendant, with a condition that whether the attachment was irregular or no was to remain *sub judice*, the defendant

* *Mackenzie v. Mackenzie*, 1851, 21 L.J. 385, Parkes, V.C. (order intituled in the cause and in the Trustee Act, affidavit intituled in the cause only); see *In re Holt*, 1879, 11 Ch. D. 168, James, L.J., after consultation with Jessel, M.R. (copy order intituled in the matter of the Act 36 & 37 Vict., c. 12, and not, as the order, in the matter of an infant, and in the matter of the Act, though copy was indorsed on the backside, *re* the infant, naming him). If the title of the affidavit in *Mackenzie v. Mackenzie* had followed the title of the order, it would have been regular, even though the title of the order were incorrect, *Mackenzie v. Mackenzie*, *ubi supra*.

† *Petty v. Daniel*, *ubi supra*; see § ii., *supra*.

‡ Ord. lxx., r. 3, a party not complying with this rule should not have his costs, though successful, *Baillie v. Goodwin*, 1886, 33 Ch. D. 604, 608.

§ Ord. lxx., r. 4.

is entitled to the costs of a motion to set aside the attachment as irregular, for he has a right to the judgment of the Court upon a matter affecting his liberty.*

When the attachment has not been procured in good faith, but the process of the Court has been made use of to compel the party's presence for some other purpose, the attachment should be discharged.†

(2.) *Certiorari* ; *Prohibition* ; *Habeas Corpus*.

Certiorari and prohibition lie from the High Court to any Court of limited jurisdiction. Unless any statute shall have expressly provided the contrary, a writ of *habeas corpus* must go from the High Court in what case soever it appears that one within the jurisdiction of the Court is detained in custody without lawful warrant or order.‡

The warrant or order of a superior Court of record is not examinable if it is general, alleging merely that a contempt was committed ; but if the facts upon which the judgment of the Court proceeded are set out, and by no fair intendment could the facts so set out constitute a contempt of the committing Court, then the order is an order made without jurisdiction, and the prisoner is entitled to his discharge.

The warrant or order of an inferior Court of record must (unless there is statutory provision to the contrary) set out the facts upon which the judgment of the Court proceeded,

* *Frowd v. Lawrence*, 1820, 1 Jac. & W. 655, Lord Eldon, L.C.

† See *Pooley v. Whetham*, 1880, 15 Ch. D. 435.

‡ See County Courts Act, 1888 (51 & 52 Vict., c. 43), ss. 127, *et seq.* ; *In re Pater*, 1864, 33 L.J. M.C. 142 ; *Mayor of London v. Cox*, 1866, L.R. 2 H.L. 239 ; *Reg. v. Lefroy*, 1873, L.R. 8 Q.B. 134. S.C. *Ex parte Folliffe*, 42 L.J. Q.B. 121 ; *Reg. v. County Court Judge of Surrey*, 1884, 13 Q.B.D. 963 ; A.P. Notes to Ord. lxviii., r. 2, and to Appendix J., No. 10 ; *Newton v. Ashew*, 1848, 18 L.J. Ch. 42. As to County Court in bankruptcy, see B.A. 1883, s. 102 (2). See also *Broad v. Perkins*, 1888, 21 Q.B.D. 533, and generally further, Short and Mellor, *Crown Practice*, where all information will be found.

shewing a charge, an opportunity of answering,* a finding, a conviction, and something directed to be done, or that the prisoner may do, to clear himself, and the jurisdiction of the Court. The committing Court itself has the power of deciding effectively, immediately, and finally upon the contempt, but if by no fair intendment could the facts set out constitute a contempt of Court, then the order is an order made without jurisdiction, and the prisoner is entitled to his discharge, to have the order quashed, or the committing Court restrained, as the case may be.†

* But if the order of an inferior Court sets forth an offence and adjudication, it is not, perhaps, necessary that it should disclose that the offender had notice, *Wilkinson v. Boulter*, 1652, 1 Lev. 162 (ward of Mayor's Court).

† See *Burdett v. Abbott*, 1811, 4 East 163, S.C. 1817, 5 Dow. 165; *Rex v. James*, 1822, 4 B. & Ald. 894; *Rex v. Faulkner*, 1835, 4 L.J. (N.S.) Ex. 308, 312, *per* Alderson, B.; *Stockdale v. Hansard*, 1839, 8 L.J. (N.S.) Q.B. 294; *Reg. v. Evans* (Sheriff of Middlesex), 1840, 9 L.J. Q.B. 82; *In re Clarke*, 1842, 11 ib. 75; *Ex parte Van Sandau*. *In re Martin*, 1844, 14 L.J. Bk. 9, S.C. 1846, 1 De G. 303; *Van Sandau* (printed *Sandau*) *v. Turner*, 1845, 14 L.J. Q.B. 154; *Green v. Elgie*, 1845, *ib.* 162; *Watson v. Bodell*, 1845, *ib.* Ex. 281; *Gosset v. Howard*, 1846-7, 16 L.J. Ex. 345, Ex. Ch.; *Levy v. Moylan*, 1850, 19 L.J. C.P. 308; *Ex parte Fernandez*, 1861, 30 *ib.* 321; *In re Pater*, 1864, 33 *ib.* M.C. 142; *In re M'Alece*, 1873, Ir. R. 7 C.L. 146, Q.B.; *Bradlaugh v. Erskine*, 1883, 47 L.T. 618; 31 W.R. 365; *Reg. v. County Court Judge of Lambeth*, 1888, 36 W.R. 475; *Reg. v. Jordan*, 1888, *ib.* 589, affirmed 57 L.J. Q.B. 483; and Art. IV., more particularly as to committal by the Lords, § iii., *ib.*, and Note II. to that Art. The Judge is exposed to an action if the order is made without jurisdiction, and the officer if it is manifest on the face of the order that it was made without jurisdiction. See *Hamond v. Howell*, 1685, 1 Mod. 184; *Bushell's Case*, 1685, *ib.* 119; *Evans v. Rees*, 1840, 9 L.J. (N.S.) M.C. 83; *Van Sandau v. Turner* and four succeeding cases *supra*; *Willis v. Maclachlan*, 1876, 1 Ex. D. 376. If officer of inferior Court obtain order on his own application, *qu.* if he is protected, if order bad though good on the face of it, *Speers v. Daggers*, 1885, 1 C. & E. 503. The Court of Chancery did not allow an action at law for irregularity in attachment, without leave, but assessed the damages itself. See *Frowd v. Lawrence*, 1820, 1 J. & W. 655; *Ex parte Clarke*, 1830, 1 R. & M. 563, 570; *Fielden v. Northern Ry. of Buenos Ayres*, W.N., 1867, p. 218; *Goucher v. Clayton*, 1866, 14 L.T. 494; *Hutton v. Smith*, 1853, 24 I.J. Ch. 147; *Arrowsmith v. Hill*, 1848, 2 Ph. 609, 612; *Whitehead v. Lynes*, 1865, 34 Beav. 161, on appeal, 12 L.T. 332; also *Morison v. Morison*, 1846,

It is not permissible to read affidavits to contradict positive statements in the return, but they may be read on both sides to shew facts not apparent on the face of the warrant.*

On applying to quash a writ *de contumace capiendo*, under which a defendant is detained in custody, it is not necessary to apply for a writ of *habeas corpus*. If the writ be bad, the defendant will be entitled to his discharge as a matter of course.†

§ vii. *Practice in Bankruptcy.*

An application to the Court in bankruptcy to commit any person for a contempt of the Court must be supported by affidavit, and filed in the Court in which the proceedings are. Subject to the provisions of the Bankruptcy Act and Rules, upon the filing of an application to commit, the Registrar must fix a time and place for the Court to hear the application, notice whereof has to be personally served upon the person sought to be committed, not less than three clear days before the day fixed for the hearing of the application, but in any case in which the Court may think fit, the Court may allow substituted service of the notice by advertisement or otherwise, or shorten the length of notice to be given.‡ Applications to commit to prison are treated with tenderness. If the order of commitment is irregularly made it should be discharged, the applicant

15 L.J. Ch. 439; *Ex parte Van Sandau*, *supra*; *Att.-Gen. v. Adams*, 1848, 17 L.J. Ch. 392; *Newton v. Askew*, 1818, 18 *ib.* 42; *Bland v. Buckley*, 1818, 6 Pr. 34 (suggesting circumstances in which action would have been allowed); *Bartlett v. Stinton*, 1866, L.R. 1 C.P. 483 (order conditional on action not being brought).

* *In re Clarke*, 1842, 11 L.J. Q.B. 75; *In re Dimes*, 1850, 19 *ib.* 158, *Ex parte Martin*, 1847, 1 De G. 485; 16 L.J. Bk. 6.

† *Rex v. Hewitt*, 1837, 5 Dowl. P.C. 646. *Habeas Corpus*, Crown side Q.B.D., Crown Office Rules, 1886, Short 107, *et seq.*

‡ Bankruptcy Rules, 1886, 85, 86.

undertaking to bring no action against the prosecutor. But the order need not in every case be discharged, nor, on the other hand, need the undertaking be always required.*

Note to Article V., § v. [Rights of and Proceedings by Party in Contempt.]

In respect of persons in contempt, as regards contempts not of a criminal nature or in regard to the non-payment of money due in a fiduciary character, the general rule stated in this section is confined to proceedings in the same cause,† and a party in contempt may proceed against his co-defendants for indemnity.‡ But where the jurisdiction of an old Court has been transferred to a new statutory Court, a party stopped by his contempt in an action in the old Court will not be permitted to proceed in the new Court with a fresh action for substantially the same matter.§

Subject to a few exceptions, a party in contempt is not entitled to take any proceedings in the cause for his own benefit,|| where he is under no compulsion

* *Ex parte Ferrige*, 1875, L.R. 20 Eq. 289; *In re Bryant*, 1876, 3 Ch. D. §10; Rule 350 (taken from R.S.C., Ord. lxx., r. 1, see § vi. (d), (1), *supra*, and *Petty v. Daniel*, there cited and referred to); see the latter part of long note *supra*. See further Art. IV., § ii. (d), (iv.); *Ib.*, § iv. (ii.) A statutory and discretionary jurisdiction to discharge should not be exercised by the Court in bankruptcy when its exercise would involve the determination of the question whether a committal by another branch of the Court was for punishment or merely to enforce compliance with an order. See *In re Deere*, 1875, L.R. 10 Ch. 658. As to appeal from committal order in Bankruptcy, see note to § vi. (c), *supra*.

† *Clark v. Dew*, 1829, 1 Ru. and M. 103; *Bristowe v. Needham*, 1847, 1 Coop. t. C. 286.

‡ *Taylor v. Taylor*, 1849, 12 Beav. 220.

§ *Ex parte Munk*, 1832, 2 Dea. & Ch. 120; *Crawforth v. Holder*, 1839, 3 Y. & C. 718.

|| *Church v. Cremer*, 1846, 1 Coop. t. C. 205.

to proceed, but comes voluntarily forward to make some application or to move for anything, or desires some favour of the Court.* And as an application for the costs of an abandoned motion is practically the same thing as a motion, a party in contempt cannot make such an application,† or can he, where a motion is necessary, claim the benefit of a statute as though he were not in contempt.‡ The party is entitled to be heard if his object is to get rid of an order (which he must yet, while it exists, obey,§ and, if the order is for attachment absolute, must submit himself in custody||), and also for the purpose of resisting, or setting aside for irregularity any proceedings subsequent to his contempt, and to point out the irregularity or impropriety of any application made by his antagonist,¶ or to direct the attention of the Court to any error or insufficiency in the plaintiff's own case, as if it should appear by the pleadings that the plaintiff's charge only extends over Whiteacre, and the plaintiff, by motion, sought a receiver over Blackacre ;** and being entitled to make an application for relief against attachment, is

* Gilb. For. Rom. 102 ; *Ricketts v. Morington*, 1834, 4 L.J. (N.S.) Ch. 21.

† *Ellice v. Walmsley*, 1835, 1 Coop. t. C. 207n.

‡ *Hewitt v. M'Cartney*, 1807, 13 Ves. 560 (7 Geo. II., c. 20).

§ *Garstin v. De Garston*, 1864, 34 L.J. P. 45 ; *Cavendish v. Cavendish*, 1866, 15 W.R. 182. See *Wenman v. Osbaldiston*, 1719, 2 Bro. P.C. 276.

|| *In re Bolton*, 1821, 2 Mol. 349 ; *Odell v. Hart*, 1828, 1 ib. 492.

¶ *Hill v. Bissel*, 1730, Mos. 258 ; *Anon. v. Lord Gort*, 1822, 1 Hog. 77 ; *Valle v. O'Reilly*, 1824, ib. 199 ; *Church v. Cremer*, ubi supra ; *Futvoye v. Kennard*, 1859, 2 Giff. 110.

** *Anon. v. Lord Gort*, ubi supra. As to irregularity further, *Green v. Green* 1828, 1 Coop. t. C. 206n, S.C. 2 Sim. 394, 430 ; *Parker v. Dawson*, 1836, 5 L.J. (N.S.) Ch. 108 (motion to discharge order to pay money into Court). S.C. *Barker v. Dawson*, 1 Coop. t. C. 207n ; *Parry v. Perryman*, 1838, ib. ; *King v. Bryant*, 1838, 7 L.J. (N.S.) Ch. 167 (want of notice to party in contempt) ; *Hawkins v. Hall*, 1839, 8 ib. 225 (motion to discharge irregular service of *subpæna* out of jurisdiction).

consequently entitled to make an application for set-off of costs, and to object to evidence intended to be used on the motion as scandalous and irrelevant,* and, if a defendant, to take every step necessary for his defence, and so may file interrogatories,† support a summons requiring the plaintiff to make the usual affidavit of documents,‡ move for leave to defend *in formâ pauperis*,§ or object to a master's report.||

Where an order to proceed has been made on the plaintiff, that order will not afterwards be stayed merely because the defendant falls into contempt.¶ And when an order has been made to tax costs, the plaintiff may proceed with the taxation, though, subsequently to the order, he has been put into contempt.**

A party in contempt suffered to proceed without objection will not afterwards be stayed.††

A defendant who has appeared, but who is in contempt for not answering, is entitled to notice of a motion for a receiver.‡‡

A party in contempt may give notice of motion, for the contempt may be cleared before the motion comes on to be

* *Cattell v. Simons*, 1843, 5 Beav. 396, S.C. *ib.* 304; see *Everet v. Prythergch*, 1841, 11 L.J. Ch. 6; cf. *Howard v. Newman*, 1828, 1 Mol. 221; *Petty v. Lonsdale*, 1839, 9 L.J. (N.S.) Ch. 107.

† *Fry v. Ernest*, 1863, 12 W.R. 97; 9 L.T. 321.

‡ *Haldane v. Eckford*, 1869, L.R. 7 Eq. 425. Defendant being in contempt for not making a similar affidavit, it was ordered that the affidavit and the production by the plaintiff were to be after the affidavit and production by the defendant.

§ *Oldfield v. Cobbett*, 1845, 1 Ph. 613.

|| *Morison v. Morison*, 1844, 14 L.J. Ch. 40.

¶ *Bickford v. Skewes*, 1839, 10 Si. 193.

** *Newton v. Ricketts*, 1848, 11 Beav. 67.

†† *Plumb v. Plumb*, 1844, 8 Jur. 165.

‡‡ *Fitzpatrick v. Hawkshaw*, 1823, 1 Hog. 82.

heard.* When the notice is given before the defendant is in contempt, an attachment issued after the notice will not prevent the motion from being made.† But where the defendant was in a situation exposed to an attachment, and then gave notice of a special motion for further time, and, before the motion was made, an attachment issued, it was ruled that the motion could not be made, leave being given the defendant to amend his notice by extending it so as to include the discharge of the attachment.‡

An objection taken to the hearing of a cause, because the plaintiff is in contempt, cannot be sustained.§ A plaintiff in contempt may proceed against the defendant for a contempt in process,|| or for production of documents.¶

When a party in contempt is entitled to be heard, he is entitled, without more, to appear, and to make applications in reference to the proceeding in which he is entitled to be heard.**

A person being illegally imprisoned will have an opportunity to place himself in a position in which he would

* *Church v. Cremer*, 1846, 1 Coop. t. C. 247. In *Hill v. Travers*, 1852, 21 L.J. Ch. 541, Romilly, M.R., held that he had no jurisdiction to order a party in contempt in another suit before Parker, V.C., to be brought up for examination by the taxing master.

† *Jeyes v. Foreman*, 1833, 3 L.J. (N.S.) Ch. 97. Shadwell, V.C.

‡ *Att.-Gen. v. Ellison*, 1829, 7 L.J. Ch. 162. Shadwell, V.C. As to when a party disobedient is in contempt, see Dan. Ch. Pr. 906, and cases cited. Submitted as regards criminal contempts, a person is not in contempt till the adjudication, his innocence being presumed theretofore.

§ *Ricketts v. Mornington*, 1834, 4 L.J. (N.S.) Ch. 21.

|| *Wilson v. Bates*, 1838, 7 L.J. (N.S.) Ch. 131.

¶ *Plumb v. Plumb*, 1840, 9 L.J. (N.S.) Ex. Eq. 9. S.C. *Plumbe v. Plumbe*, 3 Y. & C. Ex. 622.

** *Cattell v. Simons*, 1843, 5 Beav. 396, S.C. *ib.* 304. See as to appeal, *Bryan v. Twigg*, 1834, 3 L.J. (N.S.) Ch. 114. As to stay or dismissal, *Wilson v. Bates*, *ubi supra*; *Bradbury v. Shawe*, 1850, 14 Jur. 1042; *Republic of Liberia v. Roye*, 1876, 1 App. Cas. 179; *Gould v. Twine*; W.N. 1874, p. 68; 22 W.R. 398; 2 Seton 1540.

have been had he not been in prison, before further service is permissible upon him at the instance of the person who had procured his imprisonment.*

HORACE NELSON.

[*.* Persons interested in the subject-matter of these Articles, and in Contempt of Court, Committal and Attachment generally, will find the law thereon ably treated of with much interesting criticism in Mr. Oswald's book, published since this, the last Paper of this series, was in the printer's hands.—H. N.]

IV.—FOREIGN MARITIME LAWS: III. SPAIN.

CODE OF COMMERCE. BOOK III.

TIT. V.

The Proof and Adjustment of Average Losses.

SECTION I.

Rules Applicable to every Class of Average.

ART. 846. Those who are interested in the proof and adjustment of Average losses may at any time agree and mutually contract among themselves as to their liabilities, and the adjustment and payment thereof.

In default of agreement, the following rules will be observed :—

- (1.) The proof of the Average loss will be drawn up in the port in which the repairs are effected, if they were necessary, or in the port of discharge.
- (2.) The adjustment will be made in the port of discharge if it is Spanish.

* *Hawkins v. Hall*, 1839, 8 L.J. (N.S.) Ch. 225.

- (3.) If the Average loss has happened in waters outside Spanish jurisdiction, or if the cargo has been sold in a foreign port of distress, the adjustment will be made in such port of distress.
- (4.) If the Average loss has happened in the vicinity of the port of destination, so that the ship makes that port in distress, the measures referred to in clauses 1 and 2 (of this Article) will be taken in that port.

The effect of this Article is to let in such arrangements as the York-Antwerp Rules.

B. Bk. II., 118, F. 414, G. 711, 729, H. 697, 722, I. 642, N. 77, P. 650.

Lowndes, 336, 249.

847. Both in the case where the adjustment of Average is privately made in virtue of an agreement, as well as in that where the Judicial authority intervenes, on the application of an interested party who does not agree, all parties must be summoned and heard unless they renounce their right.

When the parties interested are not present and have no legal representative, the adjustment will be made by the Consul in a foreign port, and where there is none, by the Judge or competent Court, in accordance with the laws of the country and on account of all whom it may concern.

When an agent is a person of repute in the place where the adjustment is made, his intervention will be allowed, and will be legal, although his only authority is a letter from the shipowner, shipper, or insurer.

B. Bk. II., 119.

848. Claims for Average losses will not be admitted unless they exceed 5 per cent. of the interest which the claimant has in the ship or cargo, in the case of General Average, or 1 per cent. of the property injured, in the case of Particular Average, deducting in both cases, unless otherwise agreed, the expenses of the adjustment.

F. 408, 1 per cent., E. 243, 1 per cent.

849. The damages, Average losses, Bottomry loans, and their premiums and other losses of whatsoever sort, do not carry interest for delay in payment until three days have elapsed, commencing from the day on which the adjustment was completed and communicated to those concerned in the ship, her cargo, or in both together.

850. If in consequence of one or several accidents of the sea on one and the same voyage, both General and Particular Average losses befell ship or cargo or both, the expenses and losses belonging to each Average loss will be ascertained separately in the port where the repairs are effected or the goods discharged, sold, or got into condition.

For this purpose, captains are bound to require from the surveyors who make estimates, and from the persons who carry out the repairs, as also from those who regulate or effect the discharge, conditioning sale, or utilisation of the merchandise, that in their arrangements, estimates, and accounts, they shall specify with precision and separately the damages and expenses belonging to each several Average act, and in those of each class of Average distinguish what belongs to ships and what to cargo, expressing also distinctly in each case whether the losses arise out of the inherent vice of the thing and not from a peril of the sea ; and in a case in which expenses are incurred common to different classes of Averages, and to ship and cargo, they must calculate what is the share of each and express it distinctly.

SECTION II.

General Average Adjustment.

851. The statement, adjustment, and distribution of General Average will be conducted privately at the instance of the master, when all parties concerned consent. For this purpose, the captain will, within 48 hours

of the arrival of the vessel in port, call together all concerned to decide if the regulation and adjustment of General Average should be carried out by experts and Average adjusters appointed by themselves; and if those who are concerned in the matter agree, it will be so done. If they cannot agree, the captain will have recourse to the Judge or proper Tribunal, which will be that of the port where the affair should be carried out, in accordance with the provisions of the Code, or, if in a foreign port, to the Spanish Consul, if there is one, and, if not, to the local Authority.

B. Bk. II., 118, 119, G. 729, H. 724, I. 658, Sw. 151. E. 249.

852. If the captain fails to comply with the provisions of the preceding order, the charterer or shippers can claim an adjustment without prejudice to any action that may lie to enforce compensation.

G. 730, P. 652.

853. The surveyors who are appointed, whether by the parties concerned or by the Judge or Court, after accepting the nomination, will proceed to survey the ship and investigate the necessary repairs; and will estimate the amount, distinguishing Average losses and damages from the consequence of inherent defects.

The surveyors will state whether the repairs can be carried out at once, or whether it is necessary to discharge cargo for further survey and repairs. With regard to cargo, if the damage is visible, it must be proved before delivery. If not visible when discharged, it may be proved subsequently, always provided that the proof is given within 48 hours of the discharge, without prejudice to such other evidence as the surveyors may think fit.

G. 711, I. 658, N. 74, 75, Sw. 151.

854. The valuation of the things which contribute to General Average, and of those which share in it, are subject to the following rules:—

(1.) Goods preserved which have to contribute to the

payment of General Average are to be valued at the price current in the port of discharge, after deducting freight, duties, and expenses of discharge, judging by the results of the survey, and having regard to their description in the Bills of Lading, unless otherwise agreed.

- (2.) If the Average statement is made in the port of departure, the value of goods shipped will be the invoice price, with the expenses of shipment added, except premium of insurance.
- (3.) Goods that are damaged are estimated at their actual value.
- (4.) If the voyage is broken up and the goods sold in a foreign port, without an Average adjustment being possible, the value of the goods in the port of distress, or the net produce of their sale, will be taken as the basis of contribution.
- (5.) Goods, the loss of which gives rise to the General Average, will be valued at the price which similar goods fetch at the port of discharge, if their description and quality are shewn in the Bill of Lading; if not, the invoice price at port of loading, adding thereto expenses and freight subsequently paid, will be taken as the basis.
- (6.) Masts cut away, sails, cables, and other apparel of the ship expended for the safety of the ship, will be valued at current prices, deducting one-third as the difference between old and new. This deduction will not be made in the case of anchors and chains.*
- (7.) The ship will be estimated at its actual value in the state in which it is.

* The former Code took all fittings at their actual estimated value.

(8.) Fifty per cent. of the freight is deemed to be its contributory value.*

B. Bk. II., 107, 108, F. 402, G. 718—721, 723, H. 727—730, I. 647, 654—656, N. 73, 75, P. 636, 639, 647—649, R. 1093, Sw. 152, 153, 159, 160, 161. E. 250.
Lowndes, 38, 297, 305 *et seq.*

855. Goods laden on the ship's deck contribute to General Average if saved, but have no claim to contribution if they are lost in consequence of being jettisoned for the common safety, except where in coasting voyages the regulations of navigation permit them to be so carried.† The same rule applies to goods on board, not appearing in Bills of Lading or Inventory, as the case may be.

In any case the charterer and captain are answerable to shippers for damage sustained by goods laden on deck without their consent.

B. Bk. II., 109, 20, F. 420, 421, 229, G. 710, H. 732, 735, I. 649, 650, P. 640, 641, R. 1086—1089, Sw. 86, 147, 150. E. 255, 256.

Lowndes, 62, 92.

856. Provisions and ammunition for ship's use do not contribute to General Average, nor do the effects and clothes of the captain, officers, and crew. On the same principle, the personal effects and clothes of shippers, supercargoes and passengers on board at the time of the jettison are excepted.

Moreover goods jettisoned do not contribute to the payment of General Averages which happen to the goods that are preserved on a subsequent and different occasion.

B. Bk. II., 106, 113, F. 419, 425, G. 725, H. 731, I. 648, N. 76, P. 639, § 2, Sw. 163. E. 254.

Lowndes, 325.

857. When the valuation of the goods that are saved and of those which are lost causing the General Average is completed by the experts, and the repairs to the ship, if

* The former Code gave full freight, less wages; but in practice the present rule was carried out.

† See, as to deck loading, Art. 612 (5), *ante*.

needed, have been effected, and the accounts for them passed by the parties concerned, or by the Judge or Court, all the papers will be sent to the Average adjuster (*liquidator*) for the purpose of settling the distribution of the Average.

B. Bk. II., 119.

858. For the purposes of the settlement, the Average adjuster will examine the captain's protest, comparing it, if necessary, with the log-book and all the contracts entered into by the parties concerned in the Average, estimates, reports of survey, and accounts for repairs executed. If, as a result of this examination, there appears to be any defect in the proceedings which may prejudice the rights of the parties concerned, or affect the liability of the captain, he will call the attention of the person interested to the matter, if it be possible, and in any case note it in the commencement of the Average statement.

He will then proceed to adjust the incidences of the Average, for which purpose he will settle :—

- (1.) The capital liable to contribute, determined, as to the value of the cargo in conformity with the rules laid down in Art. 854.
- (2.) As to that of the ship, by the state it was in according to the reports of survey.
- (3.) As to the freight, on 50 per cent., the other 50 per cent. being allowed for wages and provisions of the crew.

The amount of the General Average being determined according to the rules laid down in this Code, it will be distributed amongst the above values proportionally.

N. 75, P. 639, 647—649. E. 250, 251.

859. Insurers of ship, freight, and cargo are bound to pay, in settlement of General Average, the amounts due from each of the said values respectively.

860. If, notwithstanding a jettison of merchandise, or sacrifice of masts, cables, and ship's fittings, the vessel is

lost whilst exposed to the same peril, there is no General Average.

The owners of goods which may be salvaged are not liable, in this case, to contribute to those jettisoned, lost or damaged.

B. Bk. II., 111, 113, F. 423, 425, G. 705, H. 734, I. 651, P. 642. E. 258.

Lowndes, 259 *et seq.*, 293.

861. If the vessel, after escaping the peril which caused the jettison, is lost by some subsequent accident in the course of her voyage, articles salvaged and remaining on board from the former peril, remain liable to contribute to that General Average, according to their value in the condition in which they are, after deducting salvage expenses.

B. Bk. II., 112, F. 424, H. 735, I. 651, P. 642, § 1. E. 259.

Lowndes, 259 *et seq.*, 293.

862. If, though the ship and cargo are temporarily preserved by the sacrifice of masts or other damage voluntarily done to the vessel for the purpose, goods are subsequently lost or stolen, the captain cannot demand a General Average contribution from shippers or consignees unless the loss is occasioned by the action of such owner or consignee.

B. Bk. II., 113, H. 736, I. 651, P. 642, § 3. E. 260.

863. If an owner of jettisoned goods recovers them after he has received compensation in General Average, he is bound to repay to the captain and those interested in the cargo the sums which he has received, deducting depreciation caused by the jettison, and salvage expenses. In this case, the sum returned will be apportioned between ship and those interested in cargo, in the same proportion as that in which they contributed to the General Average.

B. Bk. II., 115, F. 429, H. 739, I. 653, P. 646, Sw. 162. E. 266.

864. If the proprietor of jettisoned goods recovers them before he has claimed compensation (in General Average), he will not be liable to contribute to General Average which the cargo has sustained subsequent to the jettison.

G. 722, H. 740, P. 646, § 1.

865. The apportionment of General Average will not be effective in law, until it has been confirmed, or, failing that, has been approved by the Judge or Court after inspection of the statement, and hearing the interested parties themselves, or their representatives.

B. Bk. II., 119, H. 724, I. 658. E. 252.

866. When the adjustment is approved, it is the duty of the captain to carry out the apportionment, and he will be responsible to owners of goods under Average for losses that may ensue from his *laches* or negligence.

867. If the parties who are liable to contribute do not pay their *quota* within three days after demand, proceedings will be taken at the instance of the captain against the salvaged goods, so far as is necessary to obtain the amount due.

Sw. 115, 167. E. 265.

868. If a party who is interested in the receipt of the goods will not give security to answer for his General Average contribution, the captain may detain a sufficient amount of goods till payment is guaranteed.

G. 733, H. 487, Sw. 167, 168. E. 265.

SECTION III.

Settlement of Particular Average.

869. Surveyors nominated by the Judge or Court, or persons concerned, as the case may be, will proceed to survey and value such Averages in accordance with Arts. 853 and 854 (1—7), so far as the same are applicable.

END OF BOOK III.

BOOK IV.

TIT. I.

[Omitted here as relating only to Bankruptcy and Insolvency, and Winding-up of Companies.]

TIT. II.

Prescriptions.

942. The periods fixed by this Code for the prosecutions of actions arising out of mercantile contracts are absolute, and cannot be extended.

I. 915, 916.

943. Actions, for the commencement of which there is no term fixed by the Code, are regulated by the rules of Civil Law.

I. 917.

944. The running out of the term for prescription is stopped by a claim, or any other species of Judicial demand against the debtor, by an acknowledgment of the debt, or by the renewal of the document on which the right of the creditor is based. It is not deemed to be stopped by a Judicial demand if the plaintiff abandons it or lets it drop, or if it is dismissed.

The term for prescription recommences, in case of an acknowledgment of debts, from the day on which it takes place, and in case of a renewal, from the date of the renewed document, and if that postpones the date for the performance of the contract, until it becomes due.

F. 434, I. 916, Sw. 286. E. 278.

945. The term of prescription for the liability of stock-brokers, ship-brokers, and ship-interpreters on contracts in which they intervene officially, is three years.

I. 917, 922.

946. An action against security given by brokers exists for six months, reckoning from the date of the receipt of

State funds, documents of title, or funds entrusted to them for business purposes, except in cases of interruption or suspension mentioned in Art. 944, *supra*.

947. The term of prescription for action by a partner against the partnership, or *vice versâ*, is three years, reckoned from the retirement or expulsion of the partner, or the dissolution of the partnership as the case may be.

To allow this term to run, the retirement of the partner, his expulsion, or the dissolution of the partnership, must be entered in the Mercantile Register. Similarly the term is five years, reckoned from the day a liquidation commences, for the right to receive dividends or payments accruing from the service or portion of capital or shares that each partner has in the business.

I. 919.

948. The term of prescription in the case of a partner who has retired or been expelled, established as laid down in the preceding Article, is not interrupted by Judicial proceedings taken against the partnership or against another partner.

The term of prescription in the case of a partner who is a member at the time of the dissolution of the partnership is not interrupted by Judicial proceedings against another partner, but it is by those taken against the liquidators.

I. 919.

949. The term of prescription for actions against managers and directors of companies and societies is four years, reckoning from the date at which, for any reason whatever, they ceased to act.

I. 919.

950. Actions on Bills of Exchange are limited to three years from the date they become due, whether protested or not.

The same rule applies to Promissory Notes and Commercial Payments, Cheques and Drafts, and other

documents of exchange, and to dividends, and coupons which carry a liability to pay, and are issued in conformity with this Code.

I. 916, 919 (2).

951. Actions for the recovery of lighterage, freight, and charges connected with them, and for General Average contribution, are prescribed to those to whom the money is owing by the lapse of six months from the delivery of the goods.

The right to passage-money is prescribed by the same time, counting from the date of the termination of the voyage or that on which the money became due.

B. Bk. II., 236, F. 433, G. 909, H. 741, 744, I. 923, 924, Sw. 284. E. 270, 271.

So far as General Average is concerned, this Article does not apply when the parties have mutually agreed to pay the *quota* as soon as the adjustment is settled.

Sup. Trib., Madrid, 18th August, 1885, 3 *R.I.D.M.* 227.

952. The term of prescription is one year for :—

- (1.) Actions for work and labour, stores and goods or money supplied to fit out or provision vessels, or to maintain the crew, counting from the delivery of the goods or money, or the date agreed upon for payment, and from the rendering of the work and labour, unless agreed on for a specified time or voyage. If they were so agreed, the period for prescription begins to run from the termination of the voyage or the contract concerning them, and if there has been an interruption to this, from the final termination of the services.
- (2.) Actions concerning the delivery of goods carried by land or sea, or for compensation for delay or damage to the goods carried, reckoning the term from the date of delivery of the goods at their destination, or from the day on which they ought to have been delivered by the terms of the contract. Action for

existence in England of an agent of the firm for the purpose of securing orders on commission did not bring the case within the above description.

No opinion was expressed by the Court of Appeal on the real point of difficulty, but the Divisional Court held, further, that the new rules do not affect the principles laid down in *Russell v. Cambefort*, 23 Q.B.D. 526. It would therefore seem that the only practical effect of the alteration is that a firm "carrying on business in England" may be sued here *in the firm-name* (to this extent meeting the difficulty which arose in *Indigo Co. v. Ogilvy*, L.R. [1891] 2 Ch. 31), but the writ is still only good as against partners within the jurisdiction, and by r. 8 it affects the partnership assets within the jurisdiction only. The foreign partners must, therefore, still apparently be sued by individual service out of the jurisdiction under Ord. 11., r. 4.

* * *

Charter-parties—Law of the Flag.

An important decision, illustrating the principle in *Lloyd v. Guibert*, L.R. 1 Q.B. 115, was given by the Admiralty Court in the recent case of *The August*, L.R. [1891] P. 328. A German vessel, owned by Germans, shipped at Singapore cargo owned by British subjects under English bills of lading in the usual form. During the voyage, a storm arose which did much damage to the ship and cargo, and compelled the master to put into a port of distress, where, acting on the best advice, and in the absence of instructions, he sold a portion of the cargo. The consignees sued the owners for breach of contract and conversion. The Court held, in accordance with the decision in *Lloyd v. Guibert* and in *The Gaetano & Maria*, 7 P.D. 137, that "he who ships goods on board a foreign ship, ships them to be dealt with by the master of that ship, according to the law of the country of that ship, unless

there is a stipulation to the contrary." In the present case, therefore, German Law applied, and by that law the conduct of the master was justifiable.

* * *

Effect of Marriage upon Property of the Parties.

The House of Lords, in the case of *Welch v. Tennent*, L.R. [1891] Ap. Cas. 639, very clearly affirmed the well established principle that questions relating to the effect of marriage upon the property of the parties are determined, as to moveables *primâ facie* by the law of their domicile, and as to immoveables, by the *lex loci rei sitae*.

The parties were domiciled in Scotland, and there was no marriage contract, thus distinguishing the case from such cases as *In re Barnard*, 56 L.T.R. 9. Lord Herschell said: "It is manifest that the *lex loci rei sitae* must determine whether the estate be heritable estate of the wife's during coverture, and what is the nature and extent of her right in respect thereof."

J. M. GOVER.

Quarterly Notes.

Agriculturists and the Amendment of the Agricultural Holdings Act, 1883.

We are always glad to learn the views of those who are directly interested in the working of an Act when any question of a Draft Amending Act comes before the Legislature. In relation to Mr. Channing's proposed Amendments of the Agricultural Holdings Act, 1883, which seem in themselves to be, and are admitted to be, rather sweeping, it is suggested by the *Agricultural Economist* for

July last, that, under all the circumstances, it is a question whether it would not be better to "end than to attempt to mend" an Act of which it says that its "only tangible effect" has been to put money into the pockets of the professional persons engaged in administering it. This is a severe view of the Act, and it is one which does not appear to be shared by the House of Commons.

The most important point taken by Mr. Channing, in the opinion of the *Agricultural Economist*, is the provision in his Bill for the reduction of the expenses of Arbitration. "The published accounts of various arbitrations," says the authority which we cite, "on difficulties arising out of the present Act reveal the fact that the profession, in the shape of valuers, arbitrators, umpires and referees, have contrived to swallow up a sum often in excess of the balance of the award." It is not to be supposed that Arbitration can be made costless, but if things be as stated, we can scarcely wonder that an organ of the opinion of agriculturists should doubt whether it would not be better to "end" than to "amend."

* * *

Mr. Chaplin and the Re-creation of the Yeoman.

Since the attempt to amend the Agricultural Holdings Act, 1883, to the criticism of which by an organ of Agricultural opinion we have already drawn attention, our Minister of Agriculture has professed himself a convert to the saving doctrine of Small Holdings. We are not sure that Sir William Vernon Harcourt's belief that when once Mr. Chaplin has been converted there can be nobody else left to be converted is quite justified by facts. But there is one aspect of the question, as put by Mr. Chaplin himself, which strikes us as involving a Ministerial attempt to force growth, where growth, we believe, cannot be forced. Mr. Chaplin has explicitly stated in the House that he wants to "re-create the yeoman class." The decay and practical

extinction of this class has often been lamented, and its restoration might be desirable, if it were possible. But we do not in the least believe in the possibility of creating anew an entire class of the population of this country by a stroke of the pen, even though it be that of a Minister of Agriculture.

Reviews.

Revue Générale du Droit. Edited by JOSEPH LEFORT, Advocate at the Council of State and Court of Cassation. Paris: E. Thorin. 1891.

Among recent Articles in the *Revue Générale* we note particularly an elaborate sketch in the number for September-October last, of the functions and mode of working of Deliberative Assemblies, by M. Hauriou, Professor in the Faculty of Law, Toulouse, which is in the nature of advanced sheets of a work on Administrative Law, shortly to be brought out by the learned writer. This sketch, being as it were the dry bones of Constitutional Law in one of its most important branches, the Law of Parliament, as we should call it, is necessarily somewhat dry reading, but it is eminently sober and impartial in tone. Another valuable feature is a series of Articles on Greco-Roman Institutions from an Anti-Evolutionist point of view, by Dr. E. Reich, which present us with highly suggestive Papers on a subject full of interest to the Jurist as well as to the Philosopher. Dr. Reich thinks that it was not so much the Roman Law to which the English feeling expressed by the Baronage at Merton was opposed, as the Professional Jurists who were inseparable from the Roman Juridical system. And to this, the English and American mind will, he thinks, always be opposed.

Paterson's Practical Statutes of the Session 1891. Edited by JAMES S. COTTON, of Lincoln's Inn, Esq., Barrister-at-Law. Horace Cox. *Law Times Office.* 1891.

This continuation of a long roll of statutes, commenced by the learned Mr. Paterson, appears to have been adequately

carried out by the present editor, Mr. Cotton. The elimination, however, of all statutes referring entirely to Scotland, or to Ireland, is a subject of regret, as it renders the book of relative value only. Also, where the "Foreign Marriage Act" is included, we find it difficult to see by what chain of reasoning the "Consular Salaries Act" is excluded. The volume, however, is of very convenient size, and will, doubtless, prove a valuable circuit companion to barristers who travel, as may well be the case, in light marching order.

The Metropolitan Police Guide, being a compendium of the Civil and Criminal Law affecting or relating to the Metropolitan Police. By W. ARCHIBALD, Esq., M.A., one of the Masters of the Supreme Court, J. H. GREENHALGH, Esq., B.A., and JAMES ROBERTS, Esq., M.A., of the Inner Temple, Barristers-at-Law. Printed for Her Majesty's Stationery Office. 1891.

Although the primary object of this book, according to the Preface, is to educate the Police in the Police Acts, and other statutes which specially affect the Force, it is also intended to meet the requirements of the Legal Profession generally. To the latter it will probably prove of more service than it could ever be expected to prove to the former. We can scarcely contemplate seriously the probability of a constable hunting up a reference while an offender is escaping, though such an idea may be *pari passu* with much that underlies the Education Acts. As to the book itself—putting aside its *raison d'être*—it certainly contains the Acts more particularly affecting the police of the Metropolis, and the Acts relating to procedure, as well as those relating to matters and offences, arranged alphabetically. These, with a Table of Cases and of Statutes, provide a very good collection of the laws and statutes appertaining to the Metropolitan Police, and cannot fail to prove very useful both to those whose duty it is to administer the law and to those who practice in Criminal Courts, although it may be somewhat beyond the comprehension of the modern Dogberry and Verges.

THE LAW MAGAZINE AND REVIEW.

No. CCLXXXIV.—MAY, 1892.

I.—THE FUSION OF EXECUTIVE AND JUDICIAL POWERS IN INDIA.

A REFORM, long needed in India, is the complete separation of the Executive from the Judicial functions of the State—in other words, the abolition of the practice of vesting Executive officers with Judicial powers, whereby they are often called to adjudicate in suits in which their own acts or those of their subordinates, done in their Executive capacity, are the very cause of complaint. So long ago as the year 1793, this blot on our Indian administration forcibly struck Lord Cornwallis, then Governor-General, and he accordingly inserted the following passage in the Preamble to Regulation II. of that year, with reference to the practice which had previously obtained, of empowering Revenue officers to preside as Judges in Courts where complaints in Revenue matters were adjudicated:—

“It is obvious that, if the regulations for assessing and collecting the public Revenue are infringed, the Revenue officers themselves must be the aggressors, and that individuals, who have been wronged by them in one capacity, never can hope to obtain redress from them in another. The Revenue officers must be deprived of their Judicial powers. All financial claims of the public, when disputed under the Regulations, must be subjected to the cognizance of Courts of Judicature, superintended by Judges who,

from their official situations and the nature of their trusts, shall not only be wholly uninterested in the result of their decisions, but bound to decide impartially between the public and the proprietors of land, and also between the latter and their tenants. The collectors of Revenue must not only be divested of the power of deciding upon their own acts, but rendered amenable for them to the Courts of Judicature, and collect the public dues subject to a personal prosecution for every exaction exceeding the amount which they are authorised to demand on behalf of the public, and for every deviation from the regulations prescribed for the collection of it."

It was under the *régime* then established that Bengal recovered from the wretched state of destitution in which that province, now so prosperous, had remained plunged ever since it came under British rule in 1757; and the subsequent establishment, in other provinces, of Law Courts to which Revenue officers were made amenable, produced likewise the most beneficial effects. A large division in the Presidency of Bombay may be cited as an example. The condition of the Deccan in the years 1840-50, was thus represented in the Settlement reports :* "The over-estimate of the capabilities of the Deccan, acted upon by our early collectors, drained the country of its agricultural capital, and accounts for the poverty and distress in which the cultivating population has ever since been plunged. Even now, little more than a third of the arable land is under cultivation." In 1864, however, industry, encouraged by less oppressive assessments and better protection of private rights, had developed with such marvellous rapidity, that the Government of Bombay wrote on the 26th July of that year:—"There never was a time during the known history of Western India when

* *Blue Book on the Deccan Riots Commission*, 1878, paragraph 33.

land suitable for the growth of grain was in greater demand. It may be said with almost literal truth that not a thousand acres of land which had been cultivated during the memory of man, are now to be found uncultivated in the Deccan and the Konkan."*

This fair condition of things, however, was not destined to last under the irresponsible form of government imposed on India in 1858. The prosperity of the agricultural classes attracted the attention of the Revenue authorities; and extravagant assessments imposed on land soon stripped the cultivators of the savings they had laid by in prosperous years, and reduced them to the state of destitution in which they were overtaken by the drought of 1877, when millions of persons perished from want of food, and upwards of two million acres of land fell out of cultivation. Vainly had the people protested against the oppressiveness, and even the illegality of the new rates, and when, on appeal to the High Court, a cultivator shewed that the assessment of his field greatly exceeded the limit of one-sixth of the gross produce laid down in the Government regulations, and obtained a decree in his favour, a Bill was introduced in the Legislative Council withdrawing all disputes regarding Revenue and the conduct of Revenue officers from the cognizance of the Civil Courts. This measure, which was passed in 1875 as the *Bombay Revenue Jurisdiction Act*, was as complete a repudiation as can be imagined, not only of the pledge implied in the Preamble to Regulation II. of 1793, but of the plainest principles of justice.

The retrogression involved in this action of the Indian Government, together with other steps taken in the same direction, has had a very deteriorating effect on the character of our Indian administration. The anomalous

* *Blue Book on the Deccan Riots Commission*, 1878, paragraph 66.

Courts of Law, presided over by Executive officers, which are established throughout India, clearly afford undue facilities for the enforcement of arbitrary demands on behalf of the State, and have wrought much injustice. A striking instance of the evil thus produced has recently come to light through a Judgment of the Judicial Committee of the Privy Council, delivered on the 21st November, 1891.*

The owner of the Singampatti estate in the Presidency of Madras was, during his minority, deprived in the following remarkable manner of 48 square miles of mountain land belonging to that estate. The management of the property had been taken over by the Government through its Court of Wards, on the plea of protecting the interests of the owner during his long minority; soon afterwards doubts were suggested on behalf of the Government as to the validity of the Infant's title to the mountain tract in question. Later, a Survey officer, vested with Judicial powers under a Government enactment known as the *Boundary Act*, was directed to adjudicate in the matter, and he decided that the mountain tract was State property. Thereupon the Government kept possession of the land, and appropriated its produce.

The owner of Singampatti, when he had attained his majority in 1880, appealed from the decree of the Survey officer to the Civil Court of Tinnevely, adducing a grant of the estate made to his ancestor by Lord Clive in 1803, and full evidence as to its extent for a period beyond living memory. The Judge of Tinnevely, who is a member of the Government Civil Service, partially admitted the owner's claim, but the High Court of Madras (which is presided over by a member of the English Bar) reversed his decree on appeal, and granted the full redress prayed for. Against

* *The Times*, Law Report, Nov. 21, 1891. *The Secretary of State for India in Council v. Nallakutti Sivasubramania Tevar* [sic. Qy. Aiyar.—ED.]

this decision the Secretary of State for India appealed to the Queen in Council, but the decree of the Madras Court was fully affirmed by the Judicial Committee, and it was shewn at the same time that, so far back as 1843, and again in 1857 and 1858, the Government were aware that the land they claimed was part of the Singampatti estate, and that it had been dealt with as such by their own officers in the years just mentioned.

The public in this country will doubtless be startled at the revelation of such proceedings under the "paternal" administration of the Government of India, which has generally been credited with fair intentions. In this instance, however, the intention itself seems to be the weak point; and, unfortunately, the case is by no means an isolated one. Instances of deliberate injustice have occasionally come to light, betraying a degree of boldness and systematic combination, which could scarcely have been attained without habitual practice; and when the difficulties, dangers, and expense of contending with a Government (virtually despotic) are considered, the conclusion seems inevitable that the cases which have come to the knowledge of the public form but a small fraction of the number of those which have actually occurred. A few of the known instances may perhaps be usefully cited here.

In the *Koth Succession* case a landowner in the Bombay Presidency died, leaving a widow pregnant at the time of his death. The Government, on the plea that the deceased had left no heir, seized his lands and personal property. The unfortunate widow soon afterwards gave birth to a male child, and, as his guardian, claimed her late husband's property; but every obstacle was placed in the way of her getting it. She succeeded in obtaining from the Civil Court of Ahmedabad a certificate of facts which established her right; but the Government ordered the Judge to revoke that certificate. The widow then

appealed to the High Court of Bombay, when every effort was made by the Government to set aside the jurisdiction of that Court; and the spoliation would have been complete, had not the High Court vindicated its right, and firmly performed its duty. In the course of the Judgment, delivered in 1874, the Chief Justice of Bombay said:—

“I have met with no other case in the course of my long experience, which bore plainer marks of falsehood and fabrication. . . . One most extraordinary circumstance is that, after a long contest in the Courts, the Government, through their officers, requested the Judge at Ahmedabad to revoke that certificate, and the Judge was weak enough and ill-advised enough to suspend it. . . . Furthermore, there was a hue and cry throughout the country, raised through the officers of the Government, to destroy the woman's credit, in order to prevent her fighting her own and her son's battles. That was a very extraordinary course for Government officers to pursue. . . . The conduct of the Government necessarily protracted the proceedings. . . . Under all the circumstances judgment must go for the plaintiff with costs.”

In the *Oudh* case it was again a woman who was selected for spoliation. The seclusion of females in the upper classes of Oriental society places them at a great disadvantage in protecting their property. After the Mutiny of 1857, a Hindu lady of Oudh, Thákuráin Sukráj Kuar, was forcibly dispossessed of her lands on the plea of her disaffection to the British Government, and she was, at the same time, allowed no opportunity to justify herself. She laid her complaint before the Assistant Commissioner of the province, who exercised both Executive and Judicial functions; and a full investigation having proved the charge of disaffection to have been groundless, a decree was given for the restoration of her lands; but the Government stopped the execution of that decree, and ordered the case to be

tried by a superior officer, the Deputy Commissioner of Oudh. This second trial resulted likewise in favour of the lady, when the Government, loth to give up the property, once more suspended the execution of the decree, and ordered that the case should be taken up by the Chief Commissioner. This officer, who held the highest post in the province, simply reversed the judgments of his subordinates, without assigning any ground for his decision. Thus the widow was left bereft of her property. There was no Tribunal in India to which she could appeal from this last decree; but her friends assisted her in laying her case before the Queen in Council, and, after long years of anxiety and privation, the appellant obtained, in 1871, an order for the restitution of her estate of which she had then, for fourteen years, been iniquitously deprived. The following passage in the Judgment of the Judicial Committee will show the sense which the Privy Council entertained of the conduct of the Government in this lamentable case:—

“ It would be a scandal to any Legislation if it arbitrarily, and without any assignable reason, swept away such rights; and in this very painful case it is, at all events, agreeable to their Lordships to find that no such scandal attaches to the Laws in force in Oudh, and that the cruel wrong of which this lady has been the victim is due to the misapprehension* of the law by the Chief Commissioner. Their Lordships cannot but express a hope that, by an act of prompt justice and a liberal estimate of what is due to this lady, the Government will relieve her from further litigation. She had two decisions in her favour carefully and correctly adjudged, which, as they were consistent with the plainest principles of justice, it should have been

* For the delicate term “misapprehension” some might be inclined to substitute *disregard*.—J.D.

the effort of an appellate tribunal, unless the law controlled it, to maintain."

A matter for deep regret, in connection with these cases, is that the officers, whose conduct aided in the perpetration of such glaring injustice, were visited with no public signs of displeasure by either the Viceroy or the Secretary of State for India. And when it is remembered that the Government of India is responsible to no authority except Parliament, where India is not represented, it will be seen that the *régime* of 1858-61, by which India is being ruled, has provided no remedy or protection whatever against abuse of the extraordinary powers which it intrusted to the Government of that country. Can any doubt be entertained as to the issue, if this perilous situation be prolonged?

J. DACOSTA.

P.S.—Since this article was written, another case of spoliation has been brought to light in a Judgment of the Judicial Committee of the Privy Council, delivered on the 6th February, 1892.* In this instance, the Government having become possessed of the Bhaunandpur estate in Monghyr, claimed a slice of the neighbouring estate of Ishakpur, and took forcible possession of the land, without submitting their claim to any Judicial decision whatever. The owners of Ishakpur filed, in 1862, a suit for the recovery of their property; but owing to the obstacles which they encountered, it was not until 1870 that a decree for its restoration could be obtained. In 1883 the Government again claimed the same tract, and filed a suit for its

* *Times*, Law Report, Feb. 6, 1892. *The Secretary of State for India in Council v. Durbijoy Singh and others.*

possession, without, however, shewing any new ground for their action; previously to 1862 they had acknowledged and dealt with the land in question as belonging to the Ishakpur estate; and the ordinary law of limitation would have debarred their renewed claim after so long a period; but they had taken care to exempt themselves, by legislative enactment, from the operation of that law.

In order to place the respective positions of the contending parties in a clear light, it is necessary to remind English readers that the Courts which have jurisdiction in the first instance in such suits in India, are presided over, not by independent Judges or trained lawyers, but by members of the Indian Civil Service, whose advancement depends in no small measure on the satisfaction which they afford to the Government, and who, on the other hand, may, at any time, be removed to a distant part of the country, if they incur the displeasure of the Authorities. Under such circumstances, their anxiety to avoid causes of displeasure to the Government becomes quite intelligible. Indeed, there seems no other rational way of accounting for the frequency with which wrong decisions are delivered by provincial courts in India, in suits in which the Government have an interest. In the present instance, the Subordinate Judge decreed partly in favour of the Government; but the High Court of Bengal, on appeal, reversed his decree and dismissed the Government suit with costs. This Judgment has now been affirmed by the Judicial Committee of the Privy Council.

J. D.

II.—THE LAW OF POLITICAL LIBEL.

THE emancipation of printing dates from the lapse of the Licensing Act in 1695. An event which attracted little attention at the time was pregnant with momentous consequences to Civilisation, resulting as it did in the rapid rise of the English Newspaper Press. The interests of religion and morality were supposed to have needed the protection of the licenser. Experience has proved that the purity of the Press is perfectly compatible with its freedom, an improvement in its tone having coincided with an extension of its liberty.

Although the Press was theoretically free after the expiration of the Licensing Act, it was only at the peril of incurring the rigorous execution of the Libel Laws that it could participate in political discussion. Under the Plantagenets the Law of Libel was comparatively unimportant. In the time of the Tudors, and under Charles I., it became prominent. The law was administered stringently by the Star Chamber, which decided upon both the law and the facts. During the latter part of the 17th century and the beginning of the 18th century, the Court of King's Bench adopted the doctrines of the Court of Star Chamber.* The degrading punishments of the pillory, mutilation, and branding—rife under the Stuarts—were no longer inflicted, but the traditions of the Star Chamber still governed Westminster Hall.†

The ancient statutes against Libel, 3 Edw. I., c. 34 (statute of Westminster I.); 2 Ric. II., st. 1, c. 5, and 12 Ric. II., c. 11, condemn only the publication of false news. There is a provision of the Statute of Westminster I.,

* Stephen, *History of the Criminal Law*, II., 300.

† May, *Constitutional History*, II., 243.

3 Edward I., c. 34 (1275), as follows:—"Forasmuch as there have been oftentimes found in the country [devisers] of tales whereby discord or occasion of discord hath many times arisen between the King and his people, or great men of this realm, for the damage that hath and may thereof ensue, it is commanded that from henceforth none be so hardy to tell or publish any false news or tales, whereby discord, or occasion of discord or slander may grow between the King and his people, or the great men of the realm, and he that doth so shall be taken and kept in prison until he hath brought him into Court, which was the first author of the tale."

It was not, however, the mere publication of false news which was punished by the Courts. Free criticism of public men was prohibited. A perusal of the State Trials of the 18th century will furnish many interesting illustrations of the contemporary Judicial view of a journalist's functions. In 1704, John Tutchin was tried at the Guildhall for having published a "false, malicious, seditious, and scandalous libel, entitled 'The Observer.'" He was described in the information as "the daily inventor and publisher of false lies, and horrible and false lies and seditious libels, and a perpetual disturber of the peace of this Kingdom, wickedly and maliciously devising the Government and administration of justice to traduce, scandalise, and vilify, and our Lady the Queen, her ministers and officers to bring into suspicion and the ill-opinion of her subjects." The article which evoked these terrible charges was directed against the mismanagement of the Navy, and this was attributed to the appointment to responsible positions of persons who were incapable of fulfilling their duties. The writer had the hardihood to declare that in England it is our custom to find out offices for men, not men for offices — an allegation which is not altogether

unheard of in these degenerate days. Lord Chief Justice Holt laid it down in most emphatic terms that it was very necessary that the public should have a good opinion of every Government. If men should not be called to account for possessing the people with an ill-opinion of it, no Government, he declared, could subsist. Nothing could be worse than to endeavour to procure animosities as to the management of it, and this had always been looked upon as a crime.*

In the reign of Anne, the Press was to a large extent the tool of political parties. Writers in the service of rival factions were compelled to brave the vengeance of opponents whom they assailed with satire and lampoon. They could expect no mercy from the Courts or from Parliament. Everyone was a libeller who outraged the sentiments of the dominant party. The Commons rivalled the Star Chamber in their zeal against libels, and society was no less intolerant.† With the avowed purpose of repressing libels, a new restraint was devised in the form of a stamp duty on newspapers and advertisements.‡ This fiscal policy effectually checked the circulation and fettered the financial progress of the Press. It was adopted and extended by later Governments, and was only relinquished in 1855.

The trial of Richard Francklin in 1731, for printing "A letter from the Hague" in the *Country Journal* or

* Howell, *State Trials*, XIV., 1095. Tutchin had been sentenced by Jeffreys after Monmouth's Rebellion to be imprisoned for seven years, and to be whipped every year through every market town in Dorsetshire, which, it was observed, made a whipping every fortnight for seven years. He escaped his sentence by catching the small-pox, and, after his recovery, by purchasing a pardon. He went through other adventures, and was finally beaten so severely for one of his libels that he died of it. *State Trials*, XIV., 1197—1200.

† May, *Const. Hist.*, II., 244.

‡ 10 Anne, c. 19, § 101 118.

Craftsman, attests the jealousy with which the Government then viewed criticism in the Press.* In this case, what was regarded as a distinctly dangerous encroachment was made by the Judge on the province and privilege of Juries. The libel was alleged to reflect on his Majesty and his principal officers of State. Lord Raymond, C.J., said that there were two questions for the consideration of the Jury and one for the Court. The Jury were to find—(1) whether the defendant was guilty of the publication of the *Craftsman* or not; (2) whether the expressions in the letter referred to his Majesty and his principal officers and Ministers of State and were applicable to them or not. The third, whether the defamatory expressions amounted to a libel or not, belonged to the office of the Court alone, because it was a matter of law and not of fact.†

The doctrine that Juries had no voice in determining upon the criminality of a libel continued to be enforced by

* Howell, St. Tr. XVII., 626.

† It was in an action brought against the *Craftsman* in which there was an acquittal that Lord Mansfield cited a stanza from a ballad, written at the time, which supported his view that the criminality of a libel was a question for the Judge and not for the Jury. The verse, he said, ran—

“ For Sir Philip* well knows
That his innuendoes
Will serve him no longer
In verse or in prose;
For 12 honest men have decided the cause
Who are judges of fact, though not judges of law.”

A pamphlet was written in 1754 to show that Lord Mansfield was mistaken in his quotation, and that the stanza should read—

“ Sir Philip well knows
That his innuendoes
Will serve him no longer in verse or in prose;
For 12 honest men have determined the cause
Who are judges alike of the facts and the laws.”

Note to *Speeches of the Hon. Thos. Erskine*, XVII., 672.

* Sir Philip Yorke, afterwards Lord Chancellor Hardwicke, then Attorney-General.

the Courts with great emphasis during a considerable portion of the reign of George III., in the course of the prolonged struggle between the Government and the Press, on the one hand to repress and on the other to vindicate the right of freely criticising the policy and the acts of the Legislature and the Executive. Juries, however, did not always follow the direction of the Bench.

In 1752, William Owen, bookseller,* was tried in the Court of King's Bench, before Lord Chief Justice Lee, for publishing a pamphlet, entitled, *The Case of Alexander Murray, Esq., in an Appeal to the People of Great Britain*. This had been voted by the House of Commons to be an impudent, malicious, scandalous, and seditious libel. The House had addressed the King to prosecute the author, printer, and publisher; but the author having left the kingdom, the prosecution fell upon the bookseller. The fact of the publication was clearly proved, and the Judge, in summing up, declared that the Jury ought to find the defendant guilty on that ground. It was the opinion of the Court that the pamphlet was a scandalous and seditious libel, and it had been voted so by the House of Commons. The Jury, notwithstanding the opinion of the Judge and the resolution of the House of Commons, brought in a verdict of Not Guilty.

The *North Briton*, conducted by Wilkes, and "Junius" in the *Morning Advertiser*, attacked public men and measures with a degree of vehement vituperation and invective never before paralleled. For selling *The London Museum*, in which the famous letter of Junius to the King was reprinted, John Almon, a bookseller, was tried before Lord Mansfield and a special Jury on the 2nd June, 1770.† In this case two doctrines were maintained which excepted

* 18 How., St. Tr. 1203.

† Howell, St. Tr. XX., 803.

libels from the general principles of the Criminal Law—firstly, that a publisher was criminally responsible for the acts of his servants, unless he was proved to be neither privy nor to have assented to the publication of a libel; secondly, that it was the province of the Court alone to judge of the criminality of the publication complained of. The first rule was rigidly observed in the Courts until the passing of Lord Campbell's Libel Act in 1843 (6 and 7 Vict., c. 96). The second prevailed only until 1792, when Fox's Libel Act (32 Geo. III., c. 60) declared it to be contrary to the Law of England.

The year 1770 also witnessed the trial, at the Guildhall, of John Miller for reprinting the letter of Junius to the King in the *London Evening Post*. Lord Mansfield directed the Jury that the only fact to be established by their verdict was whether the defendant printed and published a paper of the tenor and meaning set forth in the information. The trial commenced about nine o'clock in the morning. At noon the Jury retired. They were locked up until half-past seven in the evening. At that hour the Court had broken up. Having agreed upon their verdict, the Jury proceeded to deliver it at Lord Mansfield's house in Bloomsbury Square. His Lordship met them at his parlour door in the passage, and the foreman having pronounced their verdict, "Not Guilty," the Chief Justice went away without saying a word. A vast concourse of people had followed the Jury from the Guildhall to the Square, and upon learning of the acquittal testified their joy by the loudest huzzas.*

Next followed the trial of Henry Sampson Woodfall, on an information filed by the Attorney-General for the original publication of the same letter of Junius in the *Morning Advertiser*. The only two points for the Jury, again insisted

* Howell, St. Tr. XX., 870.

Lord Mansfield, were the sufficiency of the evidence of publication and whether the meaning was as stated in the information. They were not to judge of the criminality of the libel. As for the intention, the malice, sedition, or any other still harder words which might be given in informations for libels, they were "mere formal words, mere words of course, mere inferences of law," with which the Jury were not to concern themselves. They were words which signified nothing. A verdict of "Guilty of printing and publishing only" was returned. The effect of this verdict was the subject of a protracted argument on a subsequent occasion. Eventually the Court held its meaning to be uncertain, and a new trial was directed.*

The right of the Jury to judge of the criminality or innocence of the alleged libel was eloquently enforced by Erskine, in his defence of the Dean of St. Asaph and of Stockdale. In 1783, soon after the termination of hostilities in the American war of Independence, the public mind in this country was directed to the necessity of a reform in Parliamentary representation. Several societies were formed in different parts of the Kingdom to promote that object. With the view of explaining in simple language, "understood of the people," the aim of the reformers and the merits of their proposal, Sir William Jones, a London barrister, afterwards a Judge of the Supreme Court, Fort William, Presidency of Bengal, and distinguished for his studies as an Orientalist, wrote a pamphlet, entitled, *A Dialogue between a Scholar and a Farmer*. The Dean of St. Asaph, who was brother-in-law to Sir William Jones, was interested in the *Dialogue*, and highly recommended it to a Reform Committee which had been formed in Flintshire. The Court party were indignant at the countenance thus given to the *Dialogue*. The Dean of St. Asaph, to signify

* Howell, St. Tr. XX., 895.

his approval of it, sent the article to be printed. He was prosecuted by indictment.* It was in moving for a new trial in this case that Erskine delivered a speech which Fox described as the finest argument in the English language. Erskine founded his motion on the simple principle that the defendant had in fact had no trial, having been found guilty without any investigation of his guilt, and without any power being left to the Jury to take cognisance of his innocence. No man should be punished for a criminal breach of any law until a Jury of his equals has pronounced him guilty in mind as well as in act. *Actus non facit reum nisi mens sit rea.* Lord Mansfield adhered to his ruling that the Jury ought not to decide the question (which was one of law) whether such a writing of such a meaning, published without lawful excuse, be criminal; and they could not decide it finally against the defendant, because after the verdict it would remain open on the record. His Lordship maintained that the practice of the Courts in this respect had been uniform since the Revolution. Mr. Justice Willes, however, in his Judgment, sanctioned by his authority Erskine's argument that upon the plea of not guilty, or upon the general issue on an indictment or information, the Jury had not only the power, but the Constitutional right to examine, if they thought fit, the criminality or the innocence of the alleged libel. A new trial was refused, but Erskine was successful on his motion in arrest of judgment on the principle of the case of the *King v. Horne*,† that there were no averments in the indictment to point the application of the paper as a libel on the King and his Government. This pamphlet was the first abstract speculative writing which had been attacked as a libel since the Revolution. It was successfully maintained that the *Dialogue*, although "wrested with

* Howell, St. Tr. XXI., 847.

† Cowp., 675.

all the force that ingenuity could apply to confound grammar and distort language," could not be twisted into a violation of any principle of Government.

In 1789 an information was filed by the Attorney-General against John Stockdale for publishing a libel on the House of Commons.* The trial took place before Lord Kenyon, C.J. A pamphlet had been written by the Rev. Mr. Logan, a minister at Leith, with the title, *A Review of the Principal Charges against Warren Hastings, Esq., late Governor-General of Bengal*. This writing was alleged to be a scandalous and seditious libel, intended to vilify the House of Commons as corrupt and unjust in its impeachment of Warren Hastings. A verdict of acquittal was found by the Jury. The *Edinburgh Review*, referring to Erskine's celebrated defence, said: "This trial may be termed the Case of Libels; for in it we have clearly laid down and most powerfully enforced the doctrine which now enters into every such question, namely, that if, taking all the parts of a composition together, it shall not be found to exceed the bounds of a free and fair discussion, so far as a regard to good order, the peace of society, and the security of the Government require; but so free as the nature of our happy constitution and the inalienable right of Englishmen to canvass public affairs allow—if, in short, the discussion be upon the whole sufficiently decent in its language and peaceable in its import, although marked with great freedom of opinion and couched in terms as animated as a free man can use on a subject that interests him deeply; although even a great share of heat should be found in the expression and such invective as, surpassing the bounds of candour and of charity, can only be excused by the violence of honest feelings; nay, although detached passages may be pitched upon in their nature and separate capacity amounting to

* Howell, St. Tr. XXII., 237.

libels, yet these also shall be overlooked and the defendant acquitted on the ground that he has only used the grand right of political discussion with uncommon vehemence. This great doctrine, now on the whole generally received, was first fully expounded in the defence of Stockdale; and it forms obviously the foundation of whatever is more than a mere name in the liberty of the Press—the first and proudest pre-eminence of this country over all the rest of Europe.”*

The persistency of the Courts in withdrawing the question of criminality from the Jury in prosecutions for Libel repeatedly attracted the attention of Parliament. In 1771 Mr. Dowdeswell proposed to introduce a Bill to declare “that jurors sworn to try the issue between the King and the defendant upon any indictment or information for libel shall be reputed competent in law and in right to try every part of the matter laid or charged comprehending the criminal intention of the defendant and the evil tendency of the libel, as well as the mere fact of the publication and the application by innuendo of blanks, initial letters, pictures, and other devices.” This Bill formed the basis of the Act which was passed twenty years later.

In 1792 Fox’s Libel Act (32 Geo. III., c. 60) was carried. It enacted—(1) that on the trial of an indictment or information for Libel the Jury may give a general verdict of guilty or not guilty upon the whole matter put in issue, and shall not be required or directed by the Court or Judge to find the defendant guilty merely on the proof of the publication by the defendant of the paper charged to be a libel, and of the sense ascribed to the same in the indictment or information; (2) the Court shall, according to its discretion, give its opinion and directions to the Jury on the matter in

* *Edinburgh Review*, XVI., 108.

issue in like manner as in other cases; and (3) the Jury may find a special verdict as in other criminal cases.

Thus the protracted controversy ended eventually in favour of the right of Juries to find a general verdict in Libel as in other criminal prosecutions.* A century's experience has proved that the law, as declared by the Legislature in 1792, has worked well, falsifying the forebodings of the Judges of the period, who predicted "the confusion and destruction of the Law of England" as the result of a change which they regarded as the subversion of a fundamental and important principle of English Jurisprudence.

Fox's Libel Act did not complete the emancipation of the Press. Liberty of discussion continued to be restrained by merciless persecution. The trials of Paine, in December, 1792, for publishing *The Rights of Man*;† of Lambert, Perry, and Gray, the proprietors and printer of the *Morning Chronicle*, for publishing on Christmas Day, 1792, an advertisement headed, "An address to the Friends of Free Inquiry and the Public Good;"‡ of the conductors of the

* *Bushell's Case* (1670):—Penn and Mead, the Quakers, being indicted for seditiously preaching to a multitude tumultuously assembled in Gracechurch Street, were tried before the Recorder of London, who told the Jury that they had nothing to do but find whether the defendants had preached or not, for that whether the matter or the intention of their preaching were seditious was a question of law and not of fact, which they were to at their peril. The Jury acquitted the accused. The jurors were fined by the Court 40 marks, and were condemned to lie in prison until the penalty was paid. Edward Bushell, foreman of the jury, sued out his writ of *habeas corpus*, and Lord Chief Justice Vaughan, in the Common Pleas, discharged him, maintaining the right of Juries to return a general verdict. (State Trials, VI., 999.) In the trial of the Seven Bishops the question of libel or no libel was left to the Jury without objection, and the Bishops' petition to the King, which was the subject of the information, was accordingly delivered to them when they withdrew to consider their verdict. (St. Tr. X., 56; Foster, 201, 202; Holt's Rep. 683; 5 Mod. 209; Stephen, *History of the Crim. Law*, II., 315.)

† 22 St. Tr. 318.

‡ 22 St. Tr. 875.

Courier, in 1799, for a libel on the Emperor of Russia;* of Jean Peltier, in 1803, for a libel on Napoleon (then First Consul);† of William Cobbett, in 1804 and 1809; of Lambert and Perry, in 1810;‡ and of John and Leigh Hunt, in 1811,§ illustrate the dangers incurred by political writers of the time.

Cobbett had inveighed against foreign mercenaries and military flogging, some soldiers in a Regiment of Militia having been flogged under a guard of the German Legion. He was indicted for a libel on that Legion, and being found guilty was sentenced to two years' imprisonment, fined £1000, and ordered to give security for £3000 to keep the peace for seven years.

In *Lambert and Perry's Case* (1810), Lord Ellenborough directed the Jury that moral blame must not be imputed to the King; but that it is not libellous to suggest that his measures are mistaken. This appears to have been the first time in which a Judge of such high authority had distinctly said that it was no libel to declare that a king was mistaken in the whole course of his policy.||

The case of Sir Francis Burdett, in 1820, deserves notice. Sir Francis had written, on the subject of the "Peterloo Massacre" in Manchester, a letter which was published in a London newspaper. He was fined £2000 and sentenced to imprisonment for three months. The proceedings on a motion for a new trial are of importance because of the Judicial interpretation of the Libel Act of 1792. The view was then stated by Best, J. (afterwards Lord Wynford), and was adopted unanimously by the Court, that the statute of George III. had not made the question of libel one of fact. If it had, instead of removing an anomaly, it would have created one. "Libel," said Best, J., "is a

* 27 St. Tr. 627.

† 28 St. Tr. 529.

‡ 31 St. Tr. 335.

§ 31 St. Tr. 367.

|| Stephen, *Hist. of the Crim. Law*, II., 368.

question of law, and the judge is the judge of the law in libel as in all other cases, the jury having the power of acting agreeably to his statement of the law or not. All that the statute does is to prevent the question from being left to the jury in the narrow way in which it was left before that time. The jury were then only to find the fact of the publication and the truth of the innuendoes, for the judges used to tell them that the intent was an inference of law to be drawn from the paper, with which the jury had nothing to do. The legislature have said that this is not so, but that the whole case is for the jury." *

The law relating to Political Libel has not been developed or altered in any way since the case of *R. v. Burdett*. If it should ever be revived, which does not at present appear probable, it will be found, says Sir James Stephen, to have been insensibly modified by the law as to defamatory libels on private persons, which has been the subject of a great number of highly important Judicial decisions. The effect of these is, amongst other things, to give a right to everyone to criticise fairly—that is, honestly, even if mistakenly—the public conduct of public men, and to comment honestly, even if mistakenly, upon the proceedings of Parliament and the Courts of Justice.†

The unsuccessful prosecution of Cobbett for an article in the *Political Register*, in 1831, nearly brought to a close the long series of contests between the Executive and the Press. From the period of the Reform Act of 1832, the utmost latitude has been permitted to public writings, and Press prosecutions for political libels, like the Censorship, have lapsed.

When Milton published his powerful protest against the Licensing Act, although abounding with political wisdom, it appeared as the voice of one crying in the wilderness. Its

* 4 B. and A. 95.

† *History of the Criminal Law*, II., 376.

force has at length been fully realised, and English statesmen, in relinquishing a policy of repression, have recognised that "when complaints are freely heard, deeply considered, and speedily reformed, then is the utmost bound of civil liberty attained that wise men look for."

J. W. ROSS BROWN.

III.—PRIVATE INTERNATIONAL LAW OF DIVORCE. III.

ENGLISH LAW (*continued*).

WE now take up the question of Jurisdiction, opening our present consideration of it with the case of absence of English domicile.

(a.) *Absence of domicile and residence in England at the time of the suit.*

i. If the husband, a foreigner, has never been domiciled or resident or even present in England at any time, it is clear he cannot in any way be subject to the jurisdiction of the Courts here, though his wife may have such residence in this country as would amount—so far as the law allows her to acquire one—to a domicile.

A. and B. having a domicile of origin in Jersey, married in that island; afterwards the husband deserted her, and went to reside in the United States. The wife came to England and established a permanent residence here. The adultery was committed in Jersey, by the law of which also the marriage was not dissoluble *à vinculo*. Upon a petition by her to dissolve the marriage on the ground of her husband's adultery and desertion, *held*, that even if the petitioner could, without a sentence of Judicial separation, acquire a distinct

domicile in this country, she could not make her husband amenable to the law of her new domicile, and as he had never been domiciled or resident in England, the Court had therefore no jurisdiction. (*Le Sueur v. Le Sueur*, 1876, 1 P.D. 139.) "Here the wife is suing her husband not in the tribunal of the place of his original domicile or marriage (according to the law of which it is not immaterial to remark the bond was indissoluble), or of delictum, or of his residence, or of his acquired domicile, but in a tribunal to which he has never been subjected by any act of his own, and, according to the authorities which I am bound to follow, this Court has no jurisdiction over the husband in this suit." Phillimore, J., *Ibid.* The converse of this case is also true, viz., that a foreign Court cannot under the same circumstances dissolve a marriage. (*Shaw v. Attorney-General*, 1870, L.R. 2 P. & D. 156.)

ii. If the husband, a foreigner, has never acquired a domicile and is not resident in England, at the time of the suit, the English Court has no jurisdiction, even though the wife is resident here and the husband himself had at a former period a residence in this country. (*Yelverton v. Yelverton*, 1859, 1 Sw. & Tr. 574; *Firebrace v. Firebrace*, 1878, 4 P.D. 63. *Vide also Niboyet v. Niboyet*, 1878, 41 P.D. 22, *per* Cotton, L.J.)

A., having a domicile of origin in Ireland, where he was born, joined (at the age of 14) an English regiment whose headquarters were at Woolwich, and resided in England for a time, but left the country shortly after, and had since resided at various places out of England, except for another short period, when he was at Hull. In 1857 he married B., a natural born Englishwoman, domiciled in England. In 1858 he deserted her at Bordeaux, and since that time had been stationed with his regiment at Edinburgh, and was at present there resident. *Held*, that the domicile of the husband is the domicile of the wife, and even supposing him

to have been guilty of such misconduct as would furnish her with a defence to a suit by him for restitution of conjugal rights, she could not on that ground acquire another domicile for herself, as was recently held in *Dolphin v. Robins*, and that the Court had no jurisdiction over a foreigner not domiciled in England at the time of the suit—who is not and was not at its commencement in England, who never had any residence in England, who never owed obedience to the laws of England except during the period of temporary sojourn here in the past, and who has not done anything in England contrary to these laws. (*Yelverton v. Yelverton*, 1859.) It would seem that the fact of the offence not having been committed in England is immaterial, and that the decision would stand even if the offence occurred in this country—*vide* next case,—and this view is favoured by the head-note in the *Law Journal* report of the case, 29 L.J. P.D. 34.

A., having a domicile of origin in Australia, married at Melbourne, in 1858, B., a native of Australia. In 1866 he came over to England with his wife, and lived at various hotels and furnished apartments till 1872, when he returned to Australia (leaving his wife here) without having acquired a domicile in England. *Held*, that the domicile of the wife is that of her husband, and her remedy for matrimonial wrongs must be usually sought in the place of that domicile, and that the Court had no authority over a domiciled foreigner after he had quitted this country for not rendering conjugal rights to his wife while here. (*Firebrace v. Firebrace*, 1878.) “The obligation of a foreigner to obey the laws of this country lasts no longer than the time during which he is within its jurisdiction, the tribunals of this country cannot call on him to obey those laws after the obligation has ceased.” Sir James Hannen. These two cases were instances of suits for the restitution of conjugal rights, but the principle applies *a fortiori* to cases of divorce. It must be admitted, however, that *Santo Teodoro v. Santo Teodoro*,

1879, 5 P.D. 79, is not easily reconcilable with these two decisions. (*See infra*.)

(b.) *Mere casual presence in England at the time of the suit.*

The jurisdiction of the English Court will not attach over a foreigner domiciled abroad, in the circumstance of mere casual residence in this country, or as a traveller. (*Brodie v. Brodie*, 1861, 2 Sw. & Tr. 259; *Manning v. Manning*, 1871, L.R. 2 P. & D. 223; *Burton v. Burton*, 1873, 21 W.R. 648; *Niboyet v. Niboyet*, 1878, 4 P.D. 1.)

In *Brodie v. Brodie*, 1861, the full Court held that *bonâ fide* residence, *not casually or as a traveller*, founded the jurisdiction of the Court. The same rule was anxiously laid down by Lords Justices James and Cotton in *Niboyet v. Niboyet*, 1878, at pp. 5, 21. "Residence, as distinct from casual presence on a visit, or *in itinere*, no doubt was an important element. . . . I do not think that the English Courts ought to have exercised, or would have exercised, jurisdiction in the case of a French matrimonial home, by reason of an act of infidelity done during a visit, or in transit through or to an English diocese. The proper Court in that case would have been a French Court." James, L.J. "It must be remembered, in considering this question of jurisdiction, that the respondent has been resident in this country not casually or as a traveller, but for several years." Cotton, L.J. The other two cases were express decisions to that effect.

A. and B., two Irish people, born in Ireland, married in Ireland. In 1836, when four years old, A. was brought by his parents to Manchester, where he remained till he came of age in 1852. In 1853 he went to Dublin, and since then had been resident there. He had carried on a business in Dublin up to one month preceding the filing of his petition. But he alleged he had taken a shop in London, where he carried on a business. It was, however, shewn that he still carried on business in Dublin, and that the lease of the shop

in London, which he had rented, was determinable at six months' notice, and that his usual place of residence continued to be in Dublin. *Held*, that the *bonâ fide* residence of the petitioner was in Dublin, and that mere casual presence in England did not give the Court jurisdiction. *Quære* whether *bonâ fide* residence in England of a petitioner who is domiciled abroad is sufficient to lay the jurisdiction of the Court. (*Manning v. Manning*, 1871, L.R. 2 P.D. 223; 40 L.J. P. & D. 18.)

A. and B., Irish persons, were married in Ireland. Some time after, the parties separated, and B., the wife, came to live in England in 1872, and had been since resident here. In the same year A. came to England with the intention, as was alleged, of purchasing a practice at L. in England. The petition was served on him while here, at the instance of his wife, for divorce on the ground of adultery and desertion committed in Ireland. A. thereupon returned to Ireland. *Held*, that the respondent was domiciled in Ireland, that the domicile of the wife was Irish also, and that the Court had no jurisdiction. The mere transitory "being" in this country is not sufficient. (*Burton v. Burton*, 1873, 21 W.R. 648.)

(c.) *Bonâ fide residence of either party in England at the time of the suit*, viz., residence above a mere casual residence, but short of domicile. There are only five decisions of this class reported in our books. No common rule can be extracted from them, and they are more or less irreconcilable with each other. Beyond the simple fact of *bonâ fide* residence, the other circumstances are dissimilar, and they can only be considered as laying down distinct propositions, which it would require a considerable amount of ingenuity to harmonise with each other.

i. Where both parties are of English origin, the Court has the jurisdiction to dissolve the marriage upon the petition of the wife resident in England, whether the

husband has acquired a foreign domicile of choice and is resident abroad (*Deck v. Deck*, 1859, 2 Sw. & Tr. 90), or is still domiciled and resident in England (*Bond v. Bond*, 1859, 2 Sw. & Tr. 93), wherever the ground of divorce arose.

A., a natural born English subject, married B., an Englishwoman, in England, where he was domiciled. A. afterwards left her, and acquired a domicile in America, and married another woman. B., who had remained resident in England continuously, petitioned for the dissolution of her marriage, for her husband's adultery and bigamy in America. *Held*, that both parties were natural born English subjects, that both, therefore, owed allegiance to the Crown of England and obedience to the Laws of England, that as allegiance could not be shaken off, the husband, though he became domiciled abroad, continued liable to be affected by the laws of his native country, and was subject to the jurisdiction of the Court; that B., being a native born Englishwoman, was entitled under sect. 27 to present her petition. (*Deck v. Deck*, 1859.)

A., presumably a natural born English subject, married B., an Englishwoman, in England. The parties lived partly in England and partly in Ireland. Cruelty was proved in England and Ireland, and adultery in Ireland. Petition and citation were served on A. in England, where he was then living. It would appear the Court went on the presumption that he was English and domiciled in England. *Held*, B., being a natural born Englishwoman, was entitled to present a petition, and that it did not so distinctly appear on the evidence that A.'s origin and domicile was Irish, as to oblige the Court to consider whether its jurisdiction over a foreigner could be maintained, and it, therefore, pronounced for the jurisdiction. (*Bond v. Bond*, 1859.)

ii. Where the wife (though at present a foreigner), was, prior to her marriage, a natural born Englishwoman, and

the husband is a foreigner, domiciled and resident abroad at the time of the suit, the Court may claim jurisdiction, if the wife is permanently resident, and there has been a long cohabitation previously, in this country; although the offence was committed abroad. (*Santo Teodoro v. Santo Teodoro*, 1879, 5 P.D. 79.)

B., a natural born Englishwoman, married, in England, A., a Neapolitan nobleman, a foreigner domiciled in Naples, on the condition of always having after the marriage a residence of six months in England. From 1855 to 1872 the husband lived six months in England, with two or three exceptions, living for the other six months either in Naples or on the Continent. In 1872 the lady separated and had since resided in England. Adultery was committed in Naples, Milan, Paris, and cruelty proved in Naples. A. was at the time of the suit domiciled in Naples and resident in Paris, where the citation was served. He did not appear. *Held*, by Sir Robert Phillimore, that the Court had jurisdiction. (*Santo Teodoro v. Santo Teodoro*, 1879.)

iii. Where the husband, a domiciled foreigner (?), is *bonâ fide* resident in England—not casually, or as a traveller—the Court has the power to dissolve the bond, though the marriage was had abroad, and the wife has been ever since her marriage resident abroad, and the adultery was committed abroad. (*Brodie v. Brodie*, 1861, 2 Sw. & Tr. 259.)

A., a Scotchman by birth, married B., an Englishwoman, in Tasmania. The parties lived together in Tasmania for a while, and then went to Australia, acquiring a domicile there. A. afterwards came to England, leaving his wife in Australia. While resident (?) in England, he petitioned for a divorce. *Held*, that the *bonâ fide* residence of the husband in this country—not casually, or as a traveller—was sufficient to found the jurisdiction of the Court against a wife who had committed adultery during such residence. *Quære*, whether such facts

would constitute the acquisition of a new domicile for testamentary purposes. This view of *Brodie v. Brodie* is based upon the words of the Judgment as reported in Swabey & Tristram.

iv. When both parties are *bonâ fide* resident in England, where their matrimonial home is, and the wrong has been done here, the Court has jurisdiction, though the parties are foreigners domiciled abroad, and the marriage took place out of England. (*Niboyet v. Niboyet*, 1878, 4 P.D. 1; *Hurley v. Hurley*, 1892, 8 T.L.R. 416.)

A., a Frenchman by origin and domicile, married an Englishwoman at Gibraltar. The parties lived abroad till 1866, when A. was appointed Vice-Consul, and lived with his wife in England till 1869. In 1875 he returned to England as a Consul, and was residing in England in the discharge of his Consular duties at the time of the wife's petition for dissolution. Adultery and the greater part of the desertion occurred in England. Citation was served on the husband in England. He appeared, under protest, and pleaded to the jurisdiction. *Held*, per Phillimore, J., in D.C., and Brett, L.J., in C.A., that the English Court has no jurisdiction, as the parties were not domiciled in England at the time of the suit. *Held*, per James and Cotton, LL.JJ., in C.A., that "Where and while the matrimonial home is in England, and the wrong done here, the English Court has jurisdiction." (*Niboyet v. Niboyet*, 1878.)

A., the petitioner, a British subject, having a domicile of origin in England, went to Ceylon, and married there B., also a British subject. The parties afterwards came to England and resided here, though still retaining the Cingalese domicile which A. had acquired. It appears that the petitioner came to England and took rooms in London, with the intention that his children should be educated in England, and that his wife should remain with them until their education was completed; even though he were

obliged to return to Ceylon. It was also found that it was his intention ultimately to rejoin them in England, either on leave, or on his retirement from the service. The adultery was committed in England, and both parties were here at the dates of service of the writ and of the action. *Held*, following *Niboyet v. Niboyet*, that the petitioner had a "matrimonial home" in England; and that the Court therefore possessed jurisdiction to dissolve the marriage. (*Hurley v. Hurley*, 1892.)

We now pass to the full consideration of the question, whether the English Court has the jurisdiction to dissolve a marriage when the parties are not domiciled in England. The aspect of the question from the point of view of general principle and International Law has been discussed under the General Rule, and we find it in favour of placing the matter upon the basis of domicile, and of denying the jurisdiction of the English Court. We have now to see how far the result of the decisions of our Courts supports or deviates from the doctrine of International Law, and for our purpose it will be found expedient to divide the cases into classes. But one thing is clear, the solution of the question must depend upon the construction of the Matrimonial Causes Act, 1858. (*Niboyet v. Niboyet*, 1877-1878, 3 P.D. 53; 4 P.D. 1.)

Prior to examining the construction of the Act, it will be necessary to define its extent. "It is an Act for England, not for the United Kingdom or Great Britain, and for the purpose of this question of jurisdiction, Scotland and Ireland (*Yelverton v. Yelverton*, 1859, 1 Sw. & Tr. 574; *Bond v. Bond*, 1860, 2 Sw. & Tr. 93), the Channel Islands (*Le Sueur v. Le Sueur*, 1876, 1 P.D. 139), and the Colonies (*Firebrace v. Firebrace*, 1878, 4 P.D. 63), are to be deemed foreign countries equally with France and Spain." Accordingly, for the purposes of the Act, the term "foreigner" will denote any person who is not English by

origin. With this remark we may pass on to the Statute. The section conferring the jurisdiction on the newly constituted Matrimonial Courts, runs as follows :—" It shall be lawful for any husband to present a petition to the said Court praying this marriage be dissolved, and it shall be lawful for any wife to present a petition." The most remarkable point in the section is the generality of the terms used. It would seem to have been the intention of the Legislature not to specify the occasions of jurisdiction rigidly, but to leave the Courts free to apply the Act in accordance with the existing tenor of the law on the subject, with the principles of justice and convenience, and the exigencies of circumstances and human affairs. That they must necessarily be brought within certain limits, and that the general rules of International Law must determine those limits, are positions with which all agree. That the section will not apply to persons of foreign origin, domiciled abroad, who have never been in England, to cases where such persons were, but are not, in England at the time of the suit, and where they are only casually resident, or merely present as travellers, no learned Judge has been found to dispute. But when we discuss the question, whether the Act, according to the principles of International Law, applies to English persons domiciled abroad, or foreigners more than casually resident, but not domiciled in England, we find a lamentable conflict of opinion amongst the Judges. "Neither the judgment of English tribunals, nor the opinions of jurists, nor the practice of Christian States, are in perfect harmony. The contract of marriage is often and truly said to be one *juris gentium*, inasmuch as it is a contract not only concerning private rights, but deeply affecting public order. It is a question both of status and of contract. Perhaps the variety of opinion to be found in the authorities, proceeded from the circumstance that some have considered it more

exclusively under the former, and some more exclusively under the latter character " (*per* Sir Robert Phillimore in *Le Sueur v. Le Sueur*, 1876). The differences of opinion as to the construction of the Act, which have at various times prevailed in the Matrimonial Courts may be reduced to three views.

(a.) *The Origin Theory.* The first and earliest view of the Act, was that it applied to all English subjects. This doctrine was for the first time boldly expressed by the full Court in *Deck v. Deck*, 1860, 2 Sw. & Tr. 90. And upon this ground of the relation between English subjects and the Laws of England, the jurisdiction of the Court over the husband, who had acquired a new domicile in America, was sustained. The *ratio decidendi* of the case is contained in the following words :—" Both parties were natural born English subjects; both therefore owed allegiance to the Crown of England and obedience to the Laws of England, that allegiance could not be shaken off by change of domicile; the husband, therefore, though he became domiciled in America, continued liable to be affected by the Laws of his native country. By sect. 27 it was enacted that it shall be lawful for any wife (which we think must certainly include any wife being an English subject). . . . In this case then we have the petition of an English wife against an English husband, and the case comes within the letter and spirit of the enactment." This doctrine, that a natural born English subject could not shake off his liability to the authority of the laws of his native country, was regarded by the Court as supported by International Law, and Story was cited for the purpose; but it is certainly not so supported, and it is the more remarkable, seeing that English persons could by acquiring a domicile in a foreign country attract the law of that country, so that it governed their succession to personalty, and the learned Judges of the Court of Probate could not have been ignorant of that

fact. If English subjects could by acquiring a domicile in France, while retaining their allegiance to the Crown of England, throw off their obedience to the Laws of England in the case of succession, why could they not, under the same circumstances, shake off the authority of the law of their native country in the case of Divorce? If the Probate Court allowed Englishmen the luxury of throwing off the English Law by a change of domicile, how could the Matrimonial Court, presided by the same Judges, hesitate? In *Bond v. Bond*, 1860, 1 Sw. & Tr. 93, the same peculiar theory was applied. "According to the evidence the petitioner was English, and therefore had a right, according to sect. 27, to present her petition." The respondent's origin was doubtful, but it was not so clearly shewn to be Irish as to compel the Court to pause and consider the step of exercising jurisdiction over a foreigner, and upon the presumption that he was English, it was held the Act applied to him, and thus, the case was in substance the same as *Deck v. Deck*, 1859. This view, as to the tenacious hold of the law of England upon persons owing allegiance to the Crown, even in the teeth of the acquisition of a foreign domicile, has never since been heard of, and may now be considered as exploded. It was a doctrine, which, even at the time *Deck v. Deck* was decided, was at variance with the principle laid down in the preceding cases. (*Vide Palmer v. Palmer, infra.*) It has been disapproved of by Lord Westbury (in *Shaw v. Gould*, 1868, L.R. 3 H.L. 55), who distinctly states, that an Englishman, by acquiring a new domicile, throws off the jurisdiction of the law of the original domicile; by Lord Penzance, by Sir Robert Phillimore, and by Lord Justice Brett in *Niboyet's Case*. In *Briggs v. Briggs*, 1880, 5 P.D. 163, the facts were almost similar. The parties were both of English origin; the wife, the petitioner, was resident in England, and the husband was in America. According to the theory of *Deck v. Deck* these

circumstances would have been quite sufficient to found jurisdiction. The question of domicile would have been unnecessary, but so far from relying upon the English origin of the parties, Sir James Hannen used language opposed to the origin theory, and made domicile the basis of the jurisdiction. Again, in *Hurley v. Hurley*, 1892, 8 T.L.R. 416, the very fact of the parties being both English and resident in England, ought to have brought the case within the rule of *Deck v. Deck*, and *Bond v. Bond*. But not only was the jurisdiction of the Court placed upon a "matrimonial home" in England, but it also appears to have been admitted that a residence short of a "matrimonial home" would not have invested the Court with competence to grant a divorce. If, however, these authorities can in any way be still good law, then they establish that besides domicile and *bonâ fide* residence, there is a third ground of jurisdiction, viz., English origin of the parties. Consistently with the theory that the English Act applied to English subjects, it was thought not to apply to foreigners, though the point was not expressly decided. In *Yelverton v. Yelverton*, 1859, 1 Sw. & Tr. 574, the Act was held not to apply to a foreigner domiciled and resident abroad at the date of the suit. In *Callwell v. Callwell*, 1860, 3 Sw. & Tr. 259, and *Zycklinski v. Zycklinski*, 1860, 2 Sw. & Tr. 420, the parties were domiciled foreigners temporarily resident in England. The Court doubted their jurisdiction in each of the two cases, but they were happily relieved from the difficulty by a technical rule. In *Bond v. Bond*, 1860, the Court again doubted very seriously its jurisdiction under the circumstance, and their decision rested on the fact that the husband's Irish origin was not clearly proved. They appear to have left the question open; but they certainly were anxious to base their judgment on the presumption of an English origin, and said that even if the Court could not exercise any authority over the

respondent, who was at the time of the petition residing in England, by reason of his birth in Ireland, yet its authority could be upheld on account of his absolute appearance. "The respondent appears to have had a residence in Ireland, from which, if that evidence stood alone, it might be inferred that his origin was Irish, and Ireland, for the purpose of this question, is to be treated as a foreign country. If the evidence on this point had been so cogent as to compel the Court to take notice that the respondent was not English, we must have decided whether or not the Court can consistently with International Law assume a right to adjudicate on a petition presented against a foreigner who is served abroad with a citation to which he does not appear. . . . We do not find evidence of so conclusive a nature as to compel us to deal with him as an Irishman." And again, in *Brodie v. Brodie*, 1861, 2 Sw. & Tr. 259, Sir Cresswell Cresswell entertained "grave doubts" whether the Court had jurisdiction in the case of a foreigner domiciled abroad (?), where there had been a long cohabitation, and where the parties had separated abroad. The principle of the immunity of a foreigner from the Divorce Act was, however, abandoned in this case, before the full Court, which for the first time established a jurisdiction over a person of foreign origin. Since then there has been no doubt as to the competence of our Courts to deal with foreigners under the Act, whether born in the British dominions (*Wilson v. Wilson*, 1872, L.R. 2 P. & D. 441) or owing allegiance to a foreign sovereign (*Niboyet v. Niboyet*, 1878, 4 P.D. 1; *Santo Teodoro v. Santo Teodoro*, 1879, 5 P.D. 79; *D'Etchegoyen v. D'Etchegoyen*, 1888, 13 P.D. 132).

(b.) *The Residence Theory.* The second construction of sect. 27 is that *bonâ fide* residence, of one or both parties, as distinguished from domicile, is sufficient to found jurisdiction, and finds expression in *Brodie v. Brodie*,

1861 (always supposing that that is the meaning of the short Judgment of the full Court, about which, however, a serious doubt may reasonably exist, *vide infra*), and in the opinions of the majority of the Court of Appeal in *Niboyet v. Niboyet*, 1878. This is the view of those who identify the present jurisdiction of the Court with the theory and practice prevalent in the old Ecclesiastical Courts. According to the arguments of the majority of the Court of Appeal, "the facts stated in the petition would have constituted a matter matrimonial in England, in which some jurisdiction would, but for the passing of the Act, have been vested in and exercised by the Ecclesiastical Courts, and such jurisdiction now belongs to and is vested in Her Majesty." By a matter matrimonial, in the particular instance of infidelity, was meant "a case of infidelity where the matrimonial home was in England." James, L.J. Upon the construction of the Act, his Lordship said: "But the same consideration is sufficient to dispose of the question discussed below—viz., whether the Court can, under the English statute, decree a dissolution of the tie. The Act was passed expressly 'to constitute a Court with exclusive jurisdiction in matters matrimonial in England, and with authority in certain cases to decree the dissolution of a marriage.' I read that as 'in certain of *such* cases,' 'in certain of such matters matrimonial in England.' And that is followed by sect. 27, which is quite universal in its language. That universality is, of course, to be limited by the object and purview of the Act, and is to be read thus, 'And in any such matrimonial matter in England, it shall be lawful for any husband and any wife.' Except such limitation, I am unable to find any limitation which on any principle of construction ought to be employed. Of course, it is always to be understood that the Legislature of a country is not intending to deal with a person or

matters over which, according to comity of nations, jurisdiction properly belongs to some other sovereign; but I do not find any violation of that comity in the Legislature of a country dealing as it may think just with persons, native or not native, domiciled or not domiciled, who elect to come and reside in that country, and during such residence to break the laws of God or of the land. . . . I find myself unable to arrive at the conclusion that the domicile of the complaining party ought to determine the existence of the limits of the jurisdiction given by the English statute to the English Courts. The only limitation I can find is the limitation of jurisdiction to those matters which come under the category of matrimonial matters in England, to every one of which the English Law, with all its consequences, so far as England is concerned, must be applied." And Cotton, L.J., argued similarly. This case lays down the rule that "where and while the matrimonial home is English, and the wrong is done here, the English jurisdiction exists, and the English Law ought to be applied"; and "that the English Court ought not to have exercised, nor would have exercised jurisdiction, in the case of a French matrimonial home, by reason of an act or infidelity done during a visit, or *in itinere*, to or through an English diocese. The proper Court in that case would have been a French Court"—that is, where the persons are neither domiciled nor resident here. *Hurley v. Hurley*, 1892, is an instance of the application of the theory to the case of two English persons. The doctrine of *Niboyet v. Niboyet* was followed, and the jurisdiction upheld on the ground that, though domiciled in Ceylon, the parties had a matrimonial home in England.

(c.) *The Domicile Theory.* The third view is that the question of the dissolution of the marriage is a question of status, to be determined exclusively by the Courts of the domicile of the parties, and that, although the

words of the statute are very wide, they must be construed strictly in accordance with the true principles of International Law. By the comity of nations, the laws of a particular country can only apply to the domiciled subjects of that State, whether natives or foreigners, and hence it could not have been the intention of the Legislature to give to the Court such unlimited authority over the status of foreigners. This was the opinion of Sir Robert Phillimore in the Court below, and of Brett, L.J., in the Court of Appeal, in *Niboyet v. Niboyet*. According to this construction, the Matrimonial Causes Act applies to all persons domiciled in England, whether of English or foreign origin and wherever resident, but cannot extend to persons domiciled abroad, whether English or foreign, though they may have a *bonâ fide* residence in this country, and the crime may also have been committed here. This is the view now generally accepted, and, it is submitted, is the true one. (But *vide Hurley v. Hurley*, 1892, *supra*.)

We have already seen that the doctrine that the Act applies only to English people, wherever domiciled, is one which few would have the hardihood now to maintain. The controversy is therefore limited to the two latter theories. In order to understand the question, we must see where the difference of opinion really lies in the two cases. That the words of the Act are too general, and cannot be construed literally, is freely admitted on both sides, and that the true construction must depend on International Law is also recognised. But what are the principles of Private International Law applicable to the matter? Each side answers differently, and herein lies the true source of the dispute. It is upon the rules of comity that the learned Judges in *Niboyet v. Niboyet* disagreed. Lords Justices James and Cotton did not see any violation of comity in applying English Law where the

matrimonial home was in England ; Sir Robert Phillimore and Brett, L.J., thought that the only legitimate conclusion of International Law was that the Act could regulate the status of none other than domiciled persons. The Judgment of the eminent Lord Justice contains clear and concise arguments for that position, and they are really unanswerable.

In order to discover for ourselves which of the two contentions is correct, we must examine first the general principles of International Law current in England upon the question, and, secondly, the English authorities having reference thereto. The general rules of comity are few and simple, and have been repeatedly laid down by James and Cotton, LL.JJ., themselves. In general, the civil status of persons is regulated by the law of the domicile of the parties. The relation of husband and wife is no exception. As marriage is the creation of the status, so divorce is the determination of that status. Divorce is an incident of status to be disposed of by the law of the domicile of the parties. (Cotton and James, LL.JJ., in *Harvey v. Farnie*, 6 P.D. 35.) *Primâ facie*, therefore, the question of the dissolution of the status and the grounds on which that relief should be granted, is one which the Court of the domicile ought to entertain, and the law which ought to be applied is the *lex domicilii*. The next consideration is how far do the decided cases on the subject of divorce adopt this principle, and how far do they dissent or deviate from it.

The bearing of the authorities upon this conflict of views will be best seen by considering each case, and discovering how far it supports the one or the other side of the question. The first case we meet with is *Yelverton v. Yelverton*, 1859, 1 Sw. & Tr. 574. The proper value of this case in the controversy must depend upon what the precise *ratio decidendi* is. It was a suit for the restitution of conjugal

rights, and the question was whether the English Court had jurisdiction over the husband, a foreigner domiciled and resident abroad at the time of the suit (but who had formerly temporarily sojourned in this country) when the alleged offence was committed abroad. The wife was resident in England. The Court held very properly that there was no jurisdiction. But upon what ground did Sir Cresswell Cresswell base his judgment? Was it only the absence of an English domicile, or was it at the same time the absence of certain other circumstances in addition to the want of the domicile, viz., residence in England at the suit, and commission of the offence in England. The learned Judge does not seem to have been very clear in expressing himself. One point may be assumed with safety. "Though Sir Cresswell Cresswell alludes to the absence of the allegation of any past breach in England as a fact in the case, the authorities he cites do not advert to that circumstance as being of importance." (*Firebrace v. Firebrace*, 1878, 4 P.D. 63, Sir James Hannen.) But what is the weight to be attached to the non-residence of Major Yelverton in England, and how far does that circumstance affect the conclusion of the Judge? It seems to me that, although that fact was present in the mind of the learned Judge Ordinary, and his attention was directed to it, the main consideration which induced him to reject the prayer of the petitioner was the Irish domicile of the respondent. "Unless some ground can be discovered for saying that Major Yelverton was domiciled in England, according to the law as laid down by Lord Lyndhurst, by Boullenois, and Story, he was not subject to the jurisdiction of the Court." The head-note also refers only to the fact of domicile, it should be noticed. Sir Robert Phillimore, in *Le Sueur v. Le Sueur*, 1876, 1 P.D. 139, regarded this case as "laying down, as principles of law, that the domicile of the wife was that of the husband, and that *actor sequitur forum*

rei." In *Firebrace v. Firebrace*, 1878, the President thought that the learned Judge Ordinary rested his judgment on the want of an English domicile in the respondent. Brett, L.J., in *Niboyet v. Niboyet*, followed Sir James Hannen's construction, but Cotton, L.J., said: "In *Yelverton v. Yelverton* the respondent was not domiciled in England or resident here, and the decision in effect was that the Court had no power to cite him, that is, no jurisdiction over him personally, he not being resident here, and that the fact of his not being resident here was pointedly before the Judge when he gave judgment appears from certain passages." It must, of course, be admitted that certain passages taken by themselves would suggest a different inference; but if they are read with other passages as a whole it would appear that the domicile alone was the most important factor in the case; at all events, that has been judicially considered to be the better view in the subsequent cases which have commented upon that decision. The next case we have to consider is *Tollemache v. Tollemache*, 1859, 1 Sw. & Tr. 557. It is pretty evident that the domicile was the turning point here. The Court was anxious to discover the domicile of the husband both at the time of the Scotch Divorce and of the petition by the husband, and finding that it was always English, refused to recognise the Scotch Decree, and upheld its own decree on the same ground, viz., domicile in England. *Ratcliff v. Ratcliff*, 1859, 1 Sw. & Tr. 217, also was decided on the domicile of the husband being English at the date of the proceedings. In *Palmer v. Palmer*, 1859, 1 Sw. & Tr. 551, 29 L.J. P. & M. 26, it did not appear where the domicile of the husband was; but the Court actually held that if an American domicile had been acquired it had no jurisdiction. The *Law Journal* report is as follows:—"Per Curiam. It does not appear that residence of the parties in America was only temporary. If he had abandoned his domicile of

origin in England and acquired a domicile in America, we have no jurisdiction." These words do not appear in *Swabey & Tristram*, but the leaning of the Court to the doctrine of domicile being the basis of jurisdiction is conspicuous. In *Manning v. Manning*, 1871, Lord Penzance distinctly professed himself in favour of that principle. The decision in this case has been entirely misrepresented in the head-note of the *Law Reports*, and has even led Sir Robert Phillimore to fall into the error that it accepts the residence doctrine of *Brodie v. Brodie* (*Le Sueur v. Le Sueur*). *Manning v. Manning* does not follow or adopt the rule in *Brodie v. Brodie*, 1861. It is an error to think so. Indeed it would be very strange to find Lord Penzance concurring with that case, when he had just immediately before said: "Now I shall forbear to discuss the question whether there can or ought to be two sorts of domiciles, whether a *bonâ fide* residence alone can in any sense be called a domicile, and whether the mere fact of residence ought or ought not to be sufficient to entitle a party to sue in this Court. I will remark in passing that when that case is reserved" His argument substantially is as follows:—"I will not decide whether *Brodie v. Brodie* is right, and whether *bonâ fide* residence alone is sufficient for jurisdiction, because it is not necessary to do so. Taking it to be granted that it is right, though I myself think domicile is the true and only test, it will be seen that in the case before me the facts do not amount to *bonâ fide* residence." The head-note in the *Law Journal* report of the case (40 L.J. P. & D. 18) is as follows:—"Held, that the Court has no jurisdiction to entertain a suit for judicial separation, when the petitioner is domiciled abroad, and is not a *bonâ fide* resident in England, but *quære*, whether a *bonâ fide* residence in England of a petitioner, who is domiciled abroad, is sufficient to give the Court jurisdiction." That this view is correct is further shewn by *Wilson v. Wilson*,

1872, L.R. 2 P. & D. 441, where his Lordship lays it down, as his strong opinion, that the domicile of the husband is alone the source of jurisdiction. The learned Judge refused to recognise *Brodie v. Brodie* as settling the point. "If the petitioner is domiciled in England at the time the suit commenced, this Court has jurisdiction; but whether any residence in this country short of domicile, using that word in its ordinary sense, will give the Court jurisdiction over parties whose domicile is elsewhere, is a question on which the authorities are not consistent. . . . It is not, however, necessary to decide here whether mere residence, short of domicile, in this country is sufficient to found the jurisdiction of the Court, because the petitioner was domiciled at the commencement of the suit in England." In *Burton v. Burton*, 1873, 21 W.R. 648, the parties were domiciled Irish people. The wife was resident in England, and the husband, after a brief sojourn in this country, returned to Ireland. The Court held that he had not acquired a residence in England, and that the jurisdiction of the Court did not attach. "The question is whether the respondent has by domicile or residence, brought himself within the jurisdiction of the Court. I think he has not. *Manning v. Manning* is decisive on the point. The residence of the respondent was in Ireland, and until he has taken up a residence in this country, he is not within the jurisdiction. Mere transitory 'being' in this country is not sufficient. The jurisdiction will not attach until he has taken up a residence in England." This case is in favour of the proposition of the full Court in *Brodie v. Brodie*, but is not consistent with what Sir James Hannen himself, who decided this case, has said in subsequent decisions. The Irish case, *Gillis v. Gillis*, 1874, L.R. 8 Eq. 597, is in favour of domicile sustaining the jurisdiction. Having held that the domicile of the petitioner was in Ireland, the Judge said: "This Court,

therefore, has jurisdiction to entertain the suit, unless it is established that the petitioner acquired a French domicile, and the facts shewed no such acquisition of a foreign domicile." This case holds that there is no jurisdiction in the Court, if the husband is domiciled in France, and the International Law, at least in England and Ireland, is identical on this point. In *Le Sueur v. Le Sueur*, 1876, 1 P.D. 139, the husband had never been domiciled or resident in England. The marriage and offence were abroad. The wife was *bonâ fide* resident in England, and it was held that, even if the wife without a sentence of Judicial separation, could acquire a distinct domicile in England, she could not make her husband amenable to the law of her new domicile. Here the facts were similar to *Brodie v. Brodie*, 1861, with the exception that the wife was the petitioner, and it establishes at least that the rule of that case does not hold in the case of a wife under the same circumstances. We have now to speak of the important decision in *Firebrace v. Firebrace*, 1878. Two domiciled Australians were married at Melbourne. The husband afterwards came with his wife to this country, and resided here for six years, and then returned alone to Australia. The wife afterwards brought a suit for the restitution of conjugal rights. *Held*, that the Court has no jurisdiction over a domiciled foreigner, after he has quitted this country, for not rendering conjugal rights to his wife while here. Commenting on *Yelverton v. Yelverton*, 1859, the Court said that case was decided on the ground of the want of an English domicile, and then followed it as a binding authority. In the Supreme Court of Victoria, the same question arose for decision in *Duggan v. Duggan*, 1877, 64 L.T. 152. This case reviewed all the English authorities down to the case of *Niboyet v. Niboyet*, 1878. The Court said: "The result of these decisions appears to be that domicile is necessary to

give jurisdiction in cases like the present." The parties were English people, born and domiciled in England, but had a *bonâ fide* residence in Australia at the time of the suit. The learned Judges refused to follow the view that residence, short of domicile, gave jurisdiction. They came to the same conclusion upon the result of the various English decisions as Sir Robert Phillimore and Lord Justice Brett arrived at, in England, in *Niboyet v. Niboyet*, 1877, 1878, 3 P.D. 53; 4 P.D. 1. The cases after 1880, are remarkable for their lucidity of expression and argument, and the Courts have developed a strong tendency since, to make domicile the exclusive test of jurisdiction.* In the several cases that have come before them, the first question which has been considered necessary is the domicile of the parties at the time of the divorce. In *Briggs v. Briggs*, 1880, 5 P.D. 153, two English persons had married in England, and the husband had afterwards gone to Kansas, and, without permanent residence there, had obtained a divorce by reason of the wife's desertion. He then married again. The wife had received no notice of the petition. Upon discovering the second marriage, she brought an action in this country, to dissolve the marriage. A pregnant remark seems to have fallen from Sir James Hannen in the course of his Judgment. After saying that either the Kansas divorce was valid, in which case the marriage was already dissolved, or it was invalid, and the wife was entitled to succeed in this suit, on account of her husband's adultery and bigamy, he said: "It is only of importance, on public grounds, that the judgment of the Court be based on principles which may be safely applied to future cases." That principle, as the decision shewed, was the founding of jurisdiction on domicile. The Court held that the domicile

* In *Hurley v. Hurley*, 1892, 8 T.L.R. 416, however, Butt, P., has followed the residence theory of the majority of the Court of Appeal in *Niboyet v. Niboyet*, 1878.

of the husband had been English continuously, that, therefore, the foreign divorce was invalid, and the English Court had jurisdiction. It appears that domicile was throughout considered as the basis of jurisdiction. Finally, we come to *D'Etchegoyen v. D'Etchegoyen*, 1888. It is especially noteworthy that in this case, which was almost identical with *Niboyet v. Niboyet*, the question was carefully considered. The petitioner was a foreigner who had married a British subject abroad. He then brought his wife and family to England, where he lived with them for some years. The matrimonial home was in England; the alleged adultery was in England. The petition was filed in 1887, when the husband was resident in this country. The circumstances were sufficient to bring the case within the principle of *Niboyet v. Niboyet*, 1878, and if that decision had been right there would have been no necessity in this case to go into the matter of domicile, but the learned President said: "This case resolves itself into the question, what was this man's domicile at the time of the institution of the suit? The result, I think, is that he has established that his domicile is English, and has never ceased to be English," and accordingly held that, on that account, the jurisdiction of the Court was sustained.

The next class of cases comprises important decisions of the House of Lords, in which the jurisdiction of the Scotch Courts to dissolve a marriage was brought into question. It is true that in these cases the Lords sat as a Scotch Court of Appeal, but the remark of Lord Selborne in *Harvey v. Farnie* as to the value of these decisions in England, will be seen to be very apposite. Referring to *Geils v. Geils*, he said: "In that case the decision of the Scotch Court was upheld by the House. No doubt that by itself does not prove that the English Court ought also to have recognised the validity of the decision; but having regard to what has constantly fallen

from learned Judges who, in this House, have determined questions of that kind with reference to general principles, I think the presumption is that an English Court, unless some reason which I am at present unable to perceive be shewn to the contrary, ought to recognise the decision of a Scotch Court in a case in which the House has held that the Scotch Court had proper jurisdiction to pass such a sentence." And see *per* Lord Westbury to the same effect. (*Udny v. Udny*, 1869, L.R. 1 Sc. & D. 441.) In *Tovey v. Lindsay*, 1813, 1 Dow 117, the Scotch Court had assumed jurisdiction, upon the view that a Scotch domicile was not necessary for its jurisdiction. A Scotchman had married an English lady at Gibraltar. Several years afterwards, having retired from the army, he came to England and resided for many years in Durham. The Lower Courts having exercised jurisdiction, Lord Eldon held the domicile to be English, and sent the case back to the Judges below to reconsider the matter of jurisdiction. The parties died, and the point was never settled, but the view of Eldon was in favour of the exercise of jurisdiction upon the ground of domicile alone. In 1835 was decided the famous case of *Warrender v. Warrender*, 2 Cl. & F. 488. The general principles of the International Law of Marriage and Divorce were very carefully considered here, and the Scotch jurisdiction was upheld in the case of a Scotch marriage, celebrated in England, between a domiciled Scotchman and an English lady, where that domicile continued to be Scotch to the time of the divorce. The domicile was held to be the basis of the jurisdiction upon the view of the comity of nations. The arguments of Lord Brougham in favour of the jurisdiction, by reason of the domicile, are very powerful indeed. *Geils v. Geils*, 1852, 1 Macq. 255, followed *Warrender v. Warrender*, and for the same reasons. *Pitt v. Pitt*, 1864, is an important case. The husband, an Englishman, domiciled at the time of the marriage in England, had

gone to Scotland and resided there for several years, to avoid the importunity of his debtors. The Second Division of the Court below had been of opinion that a real domicile in Scotland was not necessary to authorise them to grant a divorce *à vinculo*, that there might be a domicile, short of the domicile regulating succession, which would found Consistorial jurisdiction, and that the residence of the husband in Scotland not being of a mere passing and temporary character, was sufficient to constitute the matrimonial domicile, where it would be the duty of the wife to reside. This doctrine was, however, given up as untenable by Counsel in the House of Lords, and the case proceeded on the question of domicile. It thus became unnecessary for the Lords to decide that point; but Lord Westbury distinctly said that the concession of the Counsel was in accordance with the principles of International Law. The view of the Court of Session was exactly the view of the full Court in *Brodie v. Brodie*, 1861, at least, as represented in Swabey & Tristram's Report, and their expression almost *verbatim*; but the House, while not openly deciding the matter, did not concur. Thus, *Pitt v. Pitt* refuses to acknowledge for Scotland the doctrine which *Brodie v. Brodie*, 1861, and *Niboyet v. Niboyet*, 1878, seek to establish in England, and if the assumption of jurisdiction in the case of the *bonâ fide* residence of the husband in Scotland by the Scotch Courts cannot be sustained upon the grounds of International Law, it remains to be explained how the English Courts can claim jurisdiction, under the same circumstances, when they are left entirely free to limit the general words of the Act by the same rules of Comity. In both *Brodie v. Brodie*, 1861 (assuming that it was decided upon residence, and not domicile), and *Niboyet v. Niboyet*, 1878, the learned Judges expressly professed to be guided by rules of International Law, but their views of that law are in conflict with the views of the Lords in *Pitt v. Pitt*, 1864. It

cannot be urged that there is no analogy between this Scotch case and the two English ones, on the ground that the recognition of the decision of the Court of Session as untenable, was based on the Law of Nations, while the English cases turn upon the construction of an Act of Parliament. There is a plausible fallacy in this reply. Who denies that the Matrimonial Causes Act must be limited according to the rules of the Law of Nations? Certainly neither the full Court, in *Brodie v. Brodie*, nor Lords Justices James and Cotton; on the contrary, every Judge has admitted that the words of the 27th section are too wide that it is that Law alone, which must determine the construction. There is nothing strange in this. The Legacy Duty Act and the Bankruptcy Acts have been so limited (*Thompson v. Advoc.-Gen.*, 1845, 12 Cl. & F. 1; *ex parte Crispin*, 1873; L.R. 8 Ch. App. 374; *ex parte Blain*, 1879, 12 Ch. D. 522, 531). We are thus ultimately compelled to place the jurisdiction of the English Court upon International Law, just as in *Pitt v. Pitt*. The different conclusions in the three cases arise not from the fact that the English statute put a different face on the question, but because the learned Judges in the English cases, in thinking there was nothing contrary to International Law in assuming jurisdiction over persons, one or both of whom were only resident in this country, *bonâ fide* and not casually or *in itinere*, took a view of the law opposed to that of Lord Westbury and the other Lords in *Pitt v. Pitt*.

The above remark should be carefully borne in mind, as it disposes of the argument that, as in the one case, the Judges apply the Act, and in the other, only International Law, "there is no strict analogy between the cases decided here on the jurisdiction of the Court and those on the effect which is allowed in England to foreign divorces" (Nelson's *Private International Law, Selected Cases, Statutes and Orders*, p. 118). In treating of the question of the jurisdiction of the

English Courts to dissolve a marriage, the Act, no doubt, must be looked at critically, but the principles of general law are the same, whether applied to test the jurisdiction of an English Court, or to determine the validity of a foreign divorce. If the English Courts cannot admit the validity of a foreign divorce, where both parties are not at the time of the suit domiciled in the country the Court of which has pronounced the decree, and cannot do so upon the ground of International Law, it is difficult to see how they can exercise jurisdiction in the same cases, when the persons are not domiciled here at the period of the proceedings, upon the same rules. Therefore, a consideration of the authorities on the effect of a foreign divorce in this country will be of service in discovering the true rule of International Law which ought to guide the English Courts in the display of their power over foreigners domiciled abroad though *bonâ fide* resident in England. In reviewing the cases involving the question as to the recognition of a divorce granted by a foreign tribunal, the more important of them alone will be cited here, as they will be discussed at length elsewhere. Upon this question of jurisdiction, two propositions have been fully established by these authorities. Firstly, that the foreign Court has the jurisdiction to dissolve a marriage where the parties are, at the time of the proceedings, domiciled within its territory. In *Ryan v. Ryan*, 1816, 2 Phill. 332, the husband, an Irishman by birth, had for many years been permanently resident in Denmark, and had obtained a divorce by an ordinance under the hand and seal of the King of Denmark. *Held*, that the divorce was valid, "both parties being domiciled in Denmark." *Maghee v. McAllister*, 1853, 3 Ir. Ch. 604, decided by the Irish Lord Chancellor Blackburne, recognised the decree of a Scotch Court on the ground of the domicile and marriage of the parties being Scotch. In *Connelly v. Connelly*, 1851, 7 Moo. P.C. 438,

two American subjects, married in the United States, had been granted a separation *à mensâ* by Papal authority while resident at Rome. The superior Court, in reversing the Court below, sent the case back in order that the domicile, and the effect of the law of that place, might be enquired into, thus establishing the importance of the *lex domicilii* in determining the point of jurisdiction. *Argent v. Argent*, 1865, 4 Sw. & Tr. 52, was very similar to *Ryan v. Ryan*. Sir J. P. Wilde upheld the Cape divorce by reason of the husband having, prior to the suit, acquired a domicile at Grahamstown. The domicile of the parties was again recently held by Sir James Hannen to be the turning point in *Scott v. Att.-Gen.*, 1886, 11 P.D. 1,320; *Turner v. Thompson*, 1888, 13 P.D. 37. The most important of the cases of this class is undoubtedly *Harvey v. Farnie*, 1880, 1882, 5 P.D. 163; 6 P.D. 35; 8 App. C. 43. In each of the three Courts through which it passed, the relation between the jurisdiction of a Court to pronounce a decree of divorce, and the International Law of Divorce was much discussed, and the domicile recognised as the true test of jurisdiction. There is only one case, on the other hand, which is contrary to these decisions, *McCarthy v. De Caix*, 1831, 2 Cl. & F. 568; but it has now been overruled by the highest authorities in the land. The second rule to be extracted from the cases is that if the parties are not at the time of the divorce suit domiciled in the foreign country, its Courts have no competence. In *Sinclair v. Sinclair*, 1798, 1 Cons. R. 294, the husband was resident but not domiciled in Flanders, and the Belgian divorce was held invalid here, as it was not proved that he was a domiciled and incorporated inhabitant of Brussels. *Conway v. Beazley*, 1831, 3 Ecc. R. 639, strongly supports the principle of the jurisdiction being founded on the domicile of the parties. Dr. Lushington refused to recognise the view that an English marriage could not be dissolved by any other

Court, even where the parties had a *bonâ fide* domicile within its jurisdiction. In *Dolphin v. Robins*, 1859, 7 H.L.C. 390, and *Shaw v. Gould*, 1868, L.R. 3 H.L. 55, the House of Lords gave their sanction to the same rule, and Lord Penzance followed in *Shaw v. Att.-Gen.*, 1870, L.R. 2 P. & D. 156, in holding that the jurisdiction of the foreign Court depends, not upon residence, but upon domicile alone. So also Sir James Hannen in *Briggs v. Briggs*, 1880, 5 P.D. 153.

To sum up the result of all the cases, it is clearly established that International Law, as administered in England, requires, as a condition precedent to the exercise of jurisdiction, that the domicile of the parties shall be within the territory of the country, a Court of which seeks to pronounce a divorce. In my next Paper, I shall consider the cases said to be opposed to this doctrine.

E. H. MONNIER.

IV.—FOREIGN MARITIME LAWS: IV. SWEDEN.

THE Swedish Code, of which a translation is here commenced, came into operation on 1st January, 1892, in virtue of a Law of 12th June, 1891. It is the result of long discussions carried on by representatives of Sweden, Norway, and Denmark, the intention being to have an identical Maritime Law for those three Maritime Scandinavian States. The other two being both pre-occupied with Constitutional questions, have not as yet had time to pass the Law; but although we have for the present to call it the Swedish Code, there is every prospect that before the present translation is completed, it will be in fact what may

be called the Scandinavian Maritime Code. The references given, so far as they are concerned with Portugal and Russia, will differ from the corresponding numbers in the former Codes, as those States have got, the former a new, and the latter a re-arranged Code, quite recently. The Code of Portugal will either follow the present Code in the series, or be interpolated with it in alternate issues of this *Review*, as may be found most expedient.

CHAPTER I.

Ships.

1. A ship is Swedish when two-thirds at least of it is owned by Swedish subjects, or by a partnership of Swedes and Norwegians, or by a Company, whose place of business is in the kingdom, and whose shareholders are Swedish subjects. The manager must in all cases be a Swedish subject, and be domiciled in Sweden.

France, one-half in ordinary cases; a discretionary power in cases of Companies (Decree, 5th April, 1887); Italy, two-thirds, with certain exceptions in case of Companies, M.M.C. 40, 41; Portugal (Decree, 8th July, 1863), all owners must be Portuguese; Russia, as a rule all owners, and always the managing owner, R. 138.

2. A register will be kept of all Swedish vessels, intended to carry goods or convey passengers, which exceed twenty tons measurement. This register will contain, with respect to each vessel, everything that is necessary to prove its identity, as well as an accurate statement as to the shares of its owners and managers.

A Royal Decree will regulate the manner in which these vessels are registered.

G. 432, 433, I., M.M.C. 45, 46, P. 486, R. 140, S. 22, 573.

3. A person for whom a ship has been built, or who has made advances to a shipbuilder or owner of a shipbuilding yard, ought to have the builder's contract registered at the time it is drawn up before the Magistrate of the town where

the ship is built, or, if built in the country, before the Magistrate of the nearest town.

I., M.M.C. 31.

4. The owner of a vessel which is subject to registration can choose the port in the kingdom which is to be deemed the ship's home-port in accordance with Art. 2, and this intention must be entered on the register at the Magistrate's office in the town which is named as the home-port, or if such port is not a town, at the office of the Justice of the Peace of the place. As regards the home-port of a ship requiring registration, such registration must be made in accordance with Art. 2, or else a special registration must be made before the proper authorities. If the owners have omitted to make this declaration, the place of their residence will be deemed the home-port.

G. 435, I., M.M.C. 46.

5. No share in a ship can be sold to a person who is not a Swedish subject without the consent of all the co-owners. If, in consequence of a sale that has been effected without this form, a ship ceases to be Swedish, such sale will be inoperative even if the share is sold on bankruptcy or after sequestration.

If a foreigner has acquired a share in a Swedish ship, or in a ship belonging to Swedes and Norwegians, as heir, or by will, or marriage, and if by the fact of such acquisition the vessel would cease to be Swedish, such foreign owner will be obliged to sell or make over to a Swedish or Norwegian subject a share sufficiently large to allow the Swedish nationality of the vessel to be preserved.

If this formality has not been complied with within three months of the transfer, and in the place of the ship's registration, each co-owner who is aware of the state of affairs has a right to have the whole of that share in the ship, which, according to what has been said above, renders her a foreign vessel, sold for the account of the owners at the

ship's home-port, in accordance with the form prescribed for a sale by order of the Court of vessels under arrest.

G. 470, I., M.M.C. 41, 48 (2).

6. A vessel, which has sustained damage, ought to be deemed beyond repair, not only when repair is impossible or when the repairs can only be carried out in a place to which the vessel cannot be taken, but also when the vessel is not worth repairing.

Whether a vessel, after having sustained damage, ought to be made seaworthy again or not, will be decided by experts, nominated in accordance with Art. 41.

G. 444, I. 513, 632 (5), S. 579.

CHAPTER II.

Shipowners.

7. An owner is liable personally, that is to the extent of his whole property, on contracts made by himself or by his agent. An owner is only liable to the extent of the ship and freight :—

- (1.) On contracts made by the captain in that capacity, and not in virtue of a special authority from the owner.
- (2.) For debts arising from the non-performance of a contract made by the owner himself, or in pursuance of powers conferred by him, and the performance of which rests with the captain.

An owner is always personally liable for debts due to the crew arising out of shipping engagements and contracts of service made by the captain.

B. Bk. II., 7, F. 216, G. 450-454, H. 321, 322, I. 491, P. 492, R. 253, 254, 255, S. 586.

Under Art. 43 of the former Code, corresponding to the present Art. 7 (1), the owners were held liable only on ship and freight upon a special contract made by their captain with a seaman for the expenses of sending him home. (*Holmberg v. Lindahl*, Supreme Court of Sweden, 1 R.J.D.M. 412.) If a creditor takes Bills from owners or managing owner for necessities, he loses his privilege on the ship. (*Sundström v. Sand*, Supreme Court of Sweden, 5 R.J.D.M. 423.)

8. The owners are liable to the extent of ship and freight for all damage caused by the captain or any member of the crew, in consequence of default or negligence in the course of duty. And the same rule holds good if the damages are caused by any person who, though not a member of the crew, is carrying on work in the service of the ship under the orders of the captain. But, whatever the owner has to pay, he can recover from the actual wrongdoer.

B. Bk. II., 7, F. 216, G. 450-454, H. 321, I. 491, P. 492, R. 243, 244, 245, S. 586, 587.

9. If a vessel has several owners who each own a share, each part-owner is only liable in proportion to his share in the ship on those contracts for which an owner is personally liable.

F. 216, G. 474, H. 322, S. 590, 591.

10. The owners must select a managing owner (ship's husband). The managing owner can be sued in the name of the owners for all matters relating to their business as such. If there is no managing owner, a person wishing to sue the shipowners may sue any of the co-owners he chooses under the name of the owners.

G. 459-463, H. 326, 327, R. 176, S. 594, 595.

A manager *de facto* merely has not the powers given by this section, which reproduces sect. 13 of the former Law; he must be able to prove his legal appointment. (*Holmberg v. Ostlund*, Supreme Court of Sweden, 7th July, 1885, 1 R.J.D.M. 411.)

11. A managing owner has, in virtue of his position, a right to arrange with third parties all matters that are connected with the ordinary business of ownership.

Thus he may engage and dismiss the captain and give him instructions, and he can deal with the moneys of the owners.

He can sue on behalf of the owners, and, in general, act as their representative in Law.

On the other hand, the managing owner has no right, without special authority, to borrow money in the name of

the owners, or to sell or mortgage the ship, or to insure her.*

If the owners have, by special instructions, limited the powers which, in accordance with what has been said above, pertain to the managing owner, such restriction cannot be pleaded against third parties who have entered into contracts with him in good faith.

* A managing owner of a ship, which is in debt for necessities and is lost, and who has received the insurance and wound-up the ship's affairs, is liable to be sued for the necessities (*The Zakarias*, Supreme Court of Sweden, 7 R.J.D.M. 157), and in any case for clothing, victualling, and return passage of the crew (*The Theodor*, Supreme Court, 5 R.J.D.M. 416).

If, however, he has insured her, the insurers cannot set up his want of interest (*The Yoscphine*, 5 R.J.D.M. 421).

B. Bk. II., 10, G. 460, 462, H. 327, 328, 330, 333, I. 494, P. 495, §§ 3, 4. R. 117, S. 597, 598.

12. If questions affecting the interests of the owners have to be settled, this can only be effected at a meeting held after notice given in the local papers at least eight days previously. Any co-owner absent from the meeting must accept the decision arrived at. As regards the voting power of each co-owner, it is calculated in proportion to the value of his share in the vessel. The opinion of the majority of these shares is decisive. If, on the election of a managing owner, two or three of the co-owners have an equal number of votes, the question is decided by drawing lots.

Decisions which contravene the terms of the ownership agreement, or which change the object of the ship's employment, are not effective unless carried unanimously.

Minutes of each meeting must be drawn up, and will be kept by the managing owner, each co-owner having a right to take a copy of them.

B. Bk. II., 11, F. 220, G. 458, H. 320, S. 592.

13. If circumstances permit, it is the duty of the managing owner to call a meeting of the co-owners, or to take their opinion in some other way, whenever he is undertaking important business, especially if he is going to employ the

vessel in quite a different trade from her previous one, or if he is going to carry out extensive repairs.

P. 495, § 3.

14. An appointment of managing owner may be revoked at any time, in accordance with Art. 12. If the managing owner is himself owner of half or more, the Court can dismiss him on the demand of the co-owners for good cause shewn.

G. 459, H. 326, S. 594.

15. A managing owner must keep a book specially devoted to his management of the business of the owners, and must render accounts to them.

Unless otherwise agreed, the account must be rendered annually, within one month after the end of the year.

G. 465, 466, H. 338, S. 599.

16. The account must be presented at a meeting called for the purpose, in conformity with Art. 12, and all accounts must be submitted to audit. If a co-owner desires to make any claim, he must do so within six months after the accounts have been submitted to audit. After that time no claim will be admissible.

G. 466, H. 338, S. 600.

17. Each co-owner must supply his share of the necessary expenses of management in proportion to his share in the ship. If a co-owner, after being called upon for it, fails to pay his proportion, and the managing owner or any of the co-owners advances it, the defaulter is bound to pay interest at the rate of 8 per cent. on the sum advanced, from the day on which the advance was made down to the day of repayment, as well as any premium of an insurance that the person advancing the money may have made to secure it. The lender has a lien upon the defaulter's share in the ship in conformity with Ch. 17 of the Code of Commerce. He has also a right to take all the defaulter's share in the profits of the ship; this privilege ceases if the lender

has not commenced proceedings in Court against the defaulter within a year from the date of the loan.

B. Bk. II., 23, G. 467, H. 323, R. 181, S. 591.

18. When it has been decided to repair a vessel after a voyage has terminated, and advances are necessary to carry out the work so decided on, any part-owner who has disapproved of the voyage or of the repairs, can free himself from his share of the advance by giving up without compensation his share in the ship. If, however, he wishes to avail himself of this right, he must give notice to the managing owner within three days after the decision has been arrived at, or, if he was not present at the meeting of the owners, within three days after the decision has been communicated to him. The share in the vessel so given up is divided amongst the other co-owners in proportion to their original shares in the vessel.

If an insurance has been made on the share so ceded, and is still running, the other co-owners are jointly bound by the insurance on their own account, and pay the premium for the time yet to run.

G. 468, H. 324, R. 181, S. 592.

19. Profits and losses resulting from the business of the ship are divided amongst the co-owners in proportion to the share of each in the ship.

If, when the account is rendered, there is a credit balance, this balance must be divided amongst the owners, unless it is required for the urgent necessity of the ship.

G. 469, H. 338, P. 495, § 2, S. 601.

20. The association of the part-owners is not dissolved by reason of a share in the ship being transferred by succession or sale, or otherwise, whether in consequence of the co-owner being disqualified or bankrupt.

If a co-owner sells a share in the vessel to a third party, the other co-owners have a right to redeem such share on the conditions on which it was sold. Unless the sale is by

public auction, the vendor and purchaser must, when required by a co-owner, make oath that the terms stated in the Bill of Sale are *bond fide* and true. The co-owner or co-owners who desire to purchase a share in this way, must make their intention known to the first purchaser within 14 days after getting information of the sale, under penalty of losing their right to redeem. If several co-owners desire to avail themselves of the right to redeem, they can do so in proportion to their original shares in the ship.

F. 220, G. 470, 472, R. 179, S. 575.

21. If an owner transfers his share in a ship, the transferee enters into all the rights and liabilities of a co-owner with regard to the other co-owners. Moreover, all decisions that have been arrived at, all engagements entered into, and ventures that have been commenced, remain in force with regard to him in the same manner as with regard to the transferor, and the co-owners may bring into account with the transferee all debts which by the accounts for fitting out the ship are due from the transferor, or apply the profits he would get to their payment.

With respect to third parties, the transferee, as a co-owner, is liable on all contracts made with reference to the adventure subsequent to the transfer.

The transferor must give notice of the transfer to the managing owner or to all the co-owners, and prove that the transferee mentioned recognises the transfer; until this is done, the transferor cannot, as against the co-owners, set up the transfer to clear himself from a liability arising out of his connection with the adventure. As regards contracts made in good faith with third parties in connection with the adventure, the transferor is also liable on those made subsequently to the transfer. If the vessel is registered, every sale of a share must be notified to the authorities who keep the register, and who must give public notice of the

circumstance in the local newspapers. When this publication has been made, the sale is deemed to be known by third parties, and may be set up against them, unless they can shew that they had not, and could not, have had any knowledge of it.

G. 471, 474, S. 577.

22. A part-owner, or several part-owners, possessing more than half of the ship, can decide on dissolving the co-ownership.

Any part-owner can demand a dissolution of the co-ownership :—

- (1.) If the ship, without his fault or consent, ceased to be Swedish in consequence of a change of ownership (see Art. 1), and consequently is struck off the Maritime Register.
- (2.) If the managing owner has been dismissed by a Judicial decision in conformity with Art. 14.
- (3.) If the part-owner can shew that the ship's business is conducted in such a way as to injure his rights.

F. 220, G. 473, H. 325, S. 592.

23. If the co-ownership is dissolved, the vessel will be sold by public Auction. If the conditions or place of sale cannot be agreed on, the question will be settled by experts (see Art. 331).

F. 220, G. 473, H. 325, R. 182, S. 592.

F. W. RAIKES.

V.—CURRENT NOTES ON INTERNATIONAL LAW.

Public International Law.

The Institut de Droit International.

THE Annual Session of the *Institut de Droit International* was held at Hamburg in September. No detailed account of the proceedings has yet been issued, but amongst the subjects discussed were two of particular importance. The third Section of the Institute dealt with the question of the limits of the authority of a State over its Territorial waters. The two chief points for consideration were (a) whether it is not desirable that some uniform test of the limits of Territorial waters should be generally agreed upon between nations; and (b) whether it is not particularly advisable in the case of neutral marginal waters to establish by International Convention some exact limit (such as 10 or 12 kilomètres) in lieu of the present indefinite and varying standard. At the present time the lack of uniformity in this respect is a standing cause of International dispute. Different States adopt different tests on the subject. The "three mile limit," based as it is on the old restricted range of cannon shot, is in these days of heavy ordnance quite an anachronism. Perels (in *Das Internationale öffentliche Seerecht der Gegenwart*, sect. 13) states the rational view well when he says that the extension of the line should depend on the range of cannon shot at the particular period, provided that at that period it should be the same for all coasts. There is no doubt that, if occasion should arise, many States would object to the English and American rule of a "three mile" or "marine league" limit, and would, with justice, claim to have a police jurisdiction over all

offences committed within the range of a modern gunshot of their shores. Most modern International Jurists support this view (see Martens, *Précis*, I., p. 144; Bluntschli, sect. 302; Heffter, sect. 75; Klüber, sect. 130; Ortolan I., sect. 153; Schiapparelli's *Del Territorio*, p. 8; Laurence's Wheaton, 846; Gessner; Kent, I., p. 158; Hall and Field). The last-mentioned writer, in his *International Code* (2nd Ed., sect. 28), aptly sums up the question thus: "The ground of the rule is the margin of sea within reach of the land forces, or *from which the land can be assailed*." The words in italics, by the way, suggest an aspect of the subject which is usually lost sight of. These are the days of International Conferences, and there would really be very little difficulty in summoning a Congress to settle the whole question once for all if only one of the great Powers would take the initiative.

The fifth Section of the Institute dealt with the question of Extradition in case of Political offences. The recent decision in *Castioni's case* in our own Courts lends a special interest to the discussion. The test of the "politicality" of a crime which M. Albéric Rolin asked the Institute to accept, differed in some respects from that laid down (somewhat vaguely, it is true) by our Divisional Court.

M. Rolin favoured the view that "l'exception admise à cette règle pour les faits de meurtres, d'assassinats et d'empoisonnements est de plus en plus généralement acceptée." The difficulty, however, is to determine *when* killing is "murder," so as to be within the scope of the exception. The Institute, at its Oxford meeting in 1880, adopted as the test of whether acts committed in the course of a political rebellion or civil war were political or not, the question whether they are such as to be excused by the ordinary usages of war. Subsequent consideration proved that this was a dangerous and insufficient definition. M. Rolin therefore suggested in lieu of it the following

test, viz., whether "les faits ne seraient pas seulement contraires aux lois et usages de la guerre, mais constitueraient en même temps des faits de barbarie et de lèse humanité ou de vandalisme inutile." On the whole, so much depends on the peculiar circumstances of each case, that it seems doubtful whether any arbitrary and rigid test can, with advantage, be prescribed, and probably the safest method, in our own country, is to rely upon the discretion of the Judges who hear the inevitable application for a writ of *Habeas Corpus*.

* * *

The Newfoundland and Behring Sea Fisheries Dispute.

The *modus vivendi* in the French-Newfoundland controversy is still in force, and no definite conclusion has yet been arrived at. The only new development of the question is a pretty quarrel between Newfoundland and the Dominion Government, which has arisen out of the enforcement of the Bait Act. Canada, exasperated beyond measure by the exclusion of Canadian vessels from the purchase of bait in the ports of Newfoundland, retaliated by imposing a duty upon fish imported from the latter country. The result has been a Tariff war of some severity between the two Colonies.*

The Behring Sea dispute has reached a more satisfactory stage. An agreement for arbitration has been completed, and the *modus vivendi* has meanwhile been renewed.

* * *

Private International Law.

Assignment of Moveables.

It was only to be expected that the Court of Appeal would affirm the decision of North, J., in *In re Queensland Mercantile and Agency Co.*, L.R. [1891] 1 Ch. 219, but the Judgment of Lindley, L.J., is of peculiar interest for the

* See *Times*, 26th, 28th, and 30th November, and 4th December, 1891.

dicta it contains upon "International Law" as a subject of Judicial cognizance. The Court of Appeal rightly recognised the rules of Private International Law as administered by the Scotch Courts as part of the Municipal Law of Scotland, and held that, in a matter which was admittedly referable to Scotch Law, "this Court is not at liberty to review International Law so far as it becomes part of Scotch Law." Another important decision upon the law governing the assignability of moveables, was recently given by the Court of Appeal in *Alcock v. Smith*, L.R. [1892] 1 Ch. 238. The real question at issue was whether the purchaser in Norway of an overdue bill, drawn, accepted, and payable in England, took such bill free from Equities (as he would according to Norwegian Law), or subject to Equities (according to English Law). It was held by Romer, J., and on appeal, that the *lex loci* governed such a case, and that, therefore, the purchaser got a good title, free from Equities. The Courts practically held, in the words of Romer, J., that "The rights of transferror and transferee on a transfer in one country of a document of title to a debt or to an interest in personal property, are governed by the law of the country where the transfer takes place, although the debt may be due from persons living in, or the personal property may be situate in a foreign country." (Cf. *Williams v. Colonial Bank*, 15 App. Cas. 267; *Picker v. London and County Bank*, 18 Q.B.D. 515, etc.) The Bills of Exchange Act, sect. 72, sub-sect. 2, was held not to apply, and the Judicial comments upon *Lebel v. Tucker*, L.R. 3 Q.B. 77, and *Lee v. Abdy*, 17 Q.B.D. 309, are worthy of notice.

* * *

Torts to Foreign Immoveables.

It appears likely that the much vexed question as to whether our Courts have jurisdiction over foreign immoveables will be settled at last by the House of Lords. In the

recent case of *De Sousa v. The British South Africa Company*, 8 Times L.R., p. 542, the Court of Appeal (Fry and Lopes, L.L.JJ., Esher, M.R., diss.) overruled the Judgment of Wright and Lawrance, JJ., and held that "now that the fetter of local venue is removed, the Courts of this Realm have jurisdiction to try all causes of action arising abroad when the defendant is within the jurisdiction, and the Courts here can give effect to their jurisdiction, by applying the suitable remedy, but that where they cannot apply the suitable remedy, *e.g.*, in ejectment, partition of land, and other such cases, they have no jurisdiction because they are powerless to enforce a remedy, . . . therefore the plaintiff's claim for trespasses to land can be entertained." It would appear that, technically at any rate, the Court of Appeal unanimously affirmed the decision of the Divisional Court that there is no jurisdiction to grant a *Declaration of Title* to foreign immoveables; but the majority of the Court deemed it unnecessary to express any direct opinion on the point, as the plaintiffs had abandoned their claim to such a declaration. Owing to the conflict of opinion in the two Courts, it is almost certain that there will be a further appeal.

* * *

Domicile.

The facts in the case of *In re Baroness Craignish; Craignish v. Hewitt*, 8 Times L.R. 451, form a very curious illustration of the futility of dogmatising on questions of Domicile. The point at issue was whether the plaintiff had a Scotch domicile on the death of his wife. The case bears a very striking resemblance to that of *In re Patience*, 29 Ch.D. 976, but the plaintiff, in the more recent case, was held by the Court of Appeal to have acquired an English domicile within a year or two of his wife's death. The Court adopted Professor Dicey's definition of Domicile as "the country which is considered by law to be a man's permanent home,"

and made some rather striking observations on the question of the necessity of both intention and fact, in determining Domicile.

* * *

Foreign Penal Laws.

In the old case of *Ogden v. Folliott*, 3 T.R. 735, it was said by Buller and Grose, JJ., that "it is a general principle that the Penal Laws of one country cannot be taken notice of in another." In the case cited, and in *Wolff v. Oxholm*, 6 M. & S. 99, this rule was applied to a question of deprivation of property, and in *Lynch v. Provisional Government of Paraguay*, L.R. 2 P. & D. 268, and the more recent case of *Scott v. Attorney-General*, 11 P.D. 128, the principle was extended to matters of Status. An altogether novel application of it, however, came before the Privy Council in the case of *Huntington v. Attrill*, 8 *Times* L.R. 341. The action was one brought in Ontario to enforce a judgment of the Supreme Court of the State of New York for statutory penalties *claimed by a private person in his own interest*. The Judicial Committee held that the action might be entertained, and adopted the following *dictum* on the subject laid down by the U.S. Supreme Court in *Wisconsin v. The Pelican Co.*, 127 U.S. 20. "The rule that the Courts of no country execute the laws of another applies not only to prosecutions and sentences for crimes and misdemeanours, but to all suits *in favour of the State* for the recovery of pecuniary penalties for any violation of Statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties." In the present case the suit was by and in favour of a private person and not of the State, and hence was held to be maintainable.

* * *

Procedure.

It is sufficient merely to call attention to the recent cases of *Michiels v. Empire Palace Co.* (C.A.) 1892, W.N. 38, on

the construction of the words of Ord. 55, r. 6, R.S.C., "temporarily resident within the jurisdiction," in applications for security for costs; the case of *Tassell v. Hallen*, L.R. [1892] 1 Q.B. 321, on service out of the jurisdiction in an action in which a contractor's liability affecting land or hereditaments was sought to be enforced; and finally, the case of *In re the goods of Lemme*, L.R. [1892] P. 89, when our Courts granted probate of a copy of a French will of a British subject domiciled in France.

JOHN M. GOVER.

Quarterly Notes.

The following note, from our valued contributor, Mr. E. H. Monnier, reached us too late for insertion as part of his Article in the present number, and is therefore printed here so that it may be read in connection with his argument as there developed.—[ED.]

Private International Law of Divorce:

Goulder v. Goulder, 1892, 8 T.L.R. 572.

In this case, the petitioner, an Englishwoman born in France of English parents, prayed that her marriage might be dissolved, for adultery and desertion by her husband, also an English subject, whose residence at the date of the suit was unknown. The Court upheld its jurisdiction upon the English domicile of the parties at the time of the proceedings, but the case is of importance as tending to the domicile theory of divorce. The jurisdiction was sought to be placed, by the petitioner's counsel, upon the ground of the wife's English nationality, and *Deck v. Deck*, *Bond v.*

Bond, were cited for that purpose, and as an alternative, upon the domicile of the parties. *Niboyet v. Niboyet* was also cited. If *Deck v. Deck* had been correct, it would have been unnecessary to have gone into the question of domicile, as both parties were English, and the wife, the petitioner, was resident in England. But Lopes, L.J., distinctly placed his decision upon the domicile. The origin theory was not only not followed, but the learned Judge appears to have been against founding jurisdiction upon that view, for he says, on page 572, that he does not consider the declaration of English nationality by the wife, in 1880, as affecting the case. The English nationality of the husband was considered only as a criterion of the *animus revertendi*, and with a view to the consequent establishment of an English domicile. The "matrimonial home" theory of *Niboyet v. Niboyet* would have been inapplicable here, as there was no "matrimonial home" at all, either in England or elsewhere, after 1885, when the husband deserted the petitioner and went to Australia. Indeed, there was never any matrimonial residence of the parties in England at all, and the *de facto* "matrimonial home," previous to 1885, was in France. It is noteworthy that, while the majority of the Court of Appeal, in *Niboyet's Case*, expressly disavowed domicile as the test of jurisdiction, Lopes, L.J., in accordance with the better opinion which had prevailed till then, and has prevailed since, laid down, as law, that, "as a general principle, it may be stated that jurisdiction in matters of divorce depends upon the domicile of the parties at the time of the commencement of the proceedings." This doctrine is in perfect harmony with the recent tendency of the Courts in *Briggs v. Briggs* and *D'Etchegoyen v. D'Etchegoyen* in favour of the domicile, but very different from the origin and residence theories of *Deck v. Deck*, *Bond v. Bond*, and *Niboyet v. Niboyet*.

Private International Law of Divorce.

While it was obviously right to find a place, if possible, in the present number of this *Review* for the note, furnished by Mr. E. H. Monnier, of the very recent and important decision in *Goulder v. Goulder*, it seems not less right that an opportunity should also be afforded of reminding the readers of this *Review* that on some of the various and often difficult questions involved in the Article with reference to which the above note is printed, different views have been expressed or suggested in earlier numbers. In this connection we may refer particularly to a Quarterly Note of some length in No. CCLXVI., for November, 1887, p. 80, inasmuch as it was written with a view to bringing out the importance of one of the cases which have been cited in the course of the present discussion, viz., *Ingham v. Sachs*, 57 L.T. 920, and which to the author of that Note, whose contributions we could wish were more frequent than they have been of late, appeared to be entitled to a consideration equivalent to that of a "Leading case." If we remember rightly, we thought at the time that there were some circumstances connected with the aspects of that case as it arose on the Continent, which might have modified the view taken in the Note. Her Majesty's Judges, of course, are always right, but even although we may be in duty bound to hold this saving doctrine, it may not, we trust, be incompatible with holding, also, that not a few cases, especially perhaps in the Private International Law of Marriage and Divorce, are many-sided, and that all the aspects of a given case are not always before Her Majesty's Judges.

* * *

The Late Right Hon. Sir Charles Parker Butt.

In the late Sir Charles Butt we regret the loss of one, who, as a Judge, will be much and deservedly missed alike in the Division over which he had presided with marked

ability though coming after so eminent an International Jurist as Sir Robert Phillimore, and in the Association for the Reform and Codification of the Law of Nations, of which he filled the office of President for 1887-1889, having been elected to preside over the thirteenth Conference of the Association, held in London in 1887. His Presidential Address, on the Reform and Codification of the Law of Nations, was printed in this *Review*, No. CCLXV., for August, 1887.

The late Sir Charles Butt was the third son of the Rev. Phelps John Butt, of Wortham Lodge, Bournemouth, by the daughter of Rev. John Eddy, Vicar of Toddington, Gloucestershire, and was born in 1830. He was called to the Bar of the Hon. Society of Lincoln's Inn in 1854, and was called within the Bar in 1868. From 1880 till the date of his elevation to the Bench he sat as Member for Southampton, in the Liberal interest. In 1883 he was made a Judge of the High Court in the Probate, Divorce, and Admiralty Division, in which he followed the late Right Hon. Sir Robert Phillimore, Bart. Sir Charles Butt was elected a Master of the Bench of Lincoln's Inn, 1867, and was a Member of the Royal Commission on Merchant Shipping, 1884. He was sworn of the Privy Council in 1891, when he became President of the Probate, Matrimonial, Divorce, and Admiralty Division of the High Court of Justice.

* * *

The International Congress of Orientalists, Lisbon, and the Conference of the Association for the Reform and Codification of the Law of Nations, Genoa.

The Congress season of this autumn promises to be of varied interest. The Statutory Tenth International Congress of Orientalists is to meet at Lisbon, 23rd September to 1st October, under the Honorary Presidency of the King

of Portugal, and under the auspices of the Geographical Society of Lisbon, one of whose former Vice-Presidents, Count de Ficalho, Peer of Portugal, is President of the Executive Committee, while the Perpetual Secretary of the Society, the Deputy Luciano Cordeiro, is General Secretary of the Organising Committee. The Programme, as at the London Congress last year, includes a section for Comparative Law, Philosophy, and Religion, three subjects which, as we pointed out last year, are practically inseparable in connection with the East. The Lisbon Session promises to be as full of work as the London Session of 1891. The Association for the Reform and Codification of the Law of Nations, of which Dr. Sieveking, of Hamburg, is President, has accepted the cordial invitation of the Syndic of Genoa to hold its Conference there this autumn, on and after 5th October, in connection with the Columbus Commemoration and with the Italian Congress of Maritime Law, which is to be held in Genoa shortly before. The Chairman of the Executive Council, Dr. Wendt, is in communication with the Syndic, and the Programme is under the consideration of the Executive Council.

Reviews.

(*Legal Handbooks*. Edited by ALMARIC RUMSEY, Barrister-at-Law.)

Electors and Election Agents. By A. J. ELLIS. Swan Sonnenschein & Co. 1892.

This fresh instalment of the series of Handbooks edited by our valued contributor, Mr. Rumsey, comes out at a time when it is certain that its subject will be, as it has already been, before it was possible for us to notice Mr. Ellis's contribution to this series, *in ore omnium*. At whatever date it may actually come to pass, it is certain that the General Election consequent

upon a Dissolution of Parliament cannot be far off, and we may be even now at its very threshold. The changes wrought in the Law with the honourable view of making our Parliamentary Elections as pure as possible, are somewhat Draconic in the matter of expenses allowable without suspicion of Bribery or Treating, and it will not do to forget the possibility of suspicion of Undue Influence. Although these subjects are not all worked out in the compass of his volume, Mr. Ellis is careful to point out, as far as may be, what expenses the Candidate, or his Agent, or persons authorised by that Agent, may lawfully pay. It seems to us that, under the new system, the line might very easily be overstepped quite unconsciously, and we are not sure that the extreme liability to this may not be an evil almost as great as that which the new Legislation was intended to heal. From some points of view it might seem safer for the Candidate to be his own Election Agent, but as to the advisableness of such a course, much would depend upon the Candidate, and something upon the nature of the Constituency. The Handbook drawn up by Mr. Ellis deals alike with Parliamentary, Town Council, and County Council Elections, so that its contents will remain of value for reference long after the coming General Elections shall have decided, or not decided, the fate of the United Kingdom.

A Guide to the Criminal Law for the use of Students for the Bar Final and Solicitors' Final Examinations. By CHARLES THWAITES, Solicitor. Third Edition. G. Barber, *Law Students' Journal* Office. 1891.

Although much labour has evidently been lavished on this little book, we are sorry to find two serious mistakes in it. Thus at p. 11, we are told that the famous case of *R. v. Collins* was approved of by the Court in *R. v. Brown*; instead of which it was distinctly overruled. Again, on the next page (12) we are informed that if an Ambassador commit a crime against the *jus gentium*—e.g., murder—he is just as much liable as a British subject—a proposition which is absolutely wrong in every way. Apart from these errors, which can easily be amended in a future edition, the *Guide* is one which the student may consult with advantage, for the purpose for which it was compiled.

La Revue Générale. Bruxelles : Soc. Belge de Librairie. 1892.

Revue Bibliographique Belge. (Same place and date.)

These two *Reviews* are of interest to the Jurist as well as to the general reader, for they either devote Articles to questions of the day in Constitutional and other branches of Law, or they give Bibliographical notices of Legal Treatises and Reviews published in Belgium and elsewhere.

One question of the day, closely connected with Constitutional Law, is treated in the last number of the *Revue Générale* or Brussels for this year—viz., that of Ministries, under the title of "Les Ministres en Europe et en Amérique," by Jules van den Heuvel, who notices a work by Prof. Dupriez, of Louvain, which is still in progress, and which won the Odilon Barrot Prize for 1890. Ministries, as M. Van den Heuvel justly remarks, are one of the most difficult portions of the modern political mechanism that an author can set himself to describe. Nowhere is this portion of the political machine confined within well-defined written laws. All is subject to variation and indecision. Almost all countries have Ministries: nearly all seem to be moulded on the same lines. Nevertheless, when we go a little beneath the surface, we find many salient differences.

The authority of Royalty is only that of a moderating influence, and even that authority does not go the length of open resistance, but is limited to a more or less sensible influence of the personal character of the monarch. This, though said of the United Kingdom, seems to be nearly as true of Belgium. There, however, a certain amount of resistance remains in the monarch's hands, in the power of direct appeal to the people, now so well in the forefront of Belgian Constitutional Revision. In Belgium, as in this country, the King reigns but does not govern. Still, his influence is more sensible than that of the Queen in this country, for there are questions, as we see, in which the King of the Belgians has a right of active intervention. There, as here, however, the Ministry is the pivot of the system of Government, the grand motor in Politics, the director of Parliamentary debates, and the conductor of the Administration of the country. In Belgium it is not absolutely necessary for a Minister to have a seat in Parliament. Mr. Gladstone is a living witness to the fact that such a position may also be held in this country, but it is so exceptional that had we not so high a testimony to the fact, the fact itself might

not improbably be disputed. We shall hope to return to the interesting Constitutional points raised by M. Van den Heuvel in a future number. We desire, in conclusion, to draw attention to the value of the *Revue Bibliographique Belge*, under the various heads of Juridical and Political Science, Historic Science, and Social Economy, where we find brief appreciations of recent works of Lombroso, the distinguished Italian Criminal Anthropologist; Courcelle Seneuil, of the Institute; the Duc D'Aumale; the Duc de Broglie's Memoirs of Prince Talleyrand, and St. Didier's account of the Republic of Venice in the seventeenth century, and other works of interest.

Various other headings of this Bibliographical Monthly supply illustrations of Jurisprudence and History from different points of view, and both the *Revue Générale*, of Brussels, and the *Revue Bibliographique Belge* may be commended to the notice of those who desire to follow the Progress of Thought on the Continent.

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I.—JUDICIAL INDEPENDENCE IN INDIA.

A MILLION of Englishmen, at home and abroad, have doubtless read, with feelings of satisfaction, the following sentences in a leading article in the *Times* of May 23rd last :—"There is nothing in all our institutions of which we are more justly proud than the absolute independence of the Judicial Bench, and there is none of our traditions which we would more gladly see reproduced and perpetuated in the great communities which it has been our destiny to found in distant lands." At the same time, the following question must have arisen in the minds of many readers, viz. :—"What have we done towards perpetuating that glorious tradition in India, among the largest community that Providence has placed under British rule?"

Judicial independence in India is to be found only in the four Presidency High Courts, which exercise a limited original jurisdiction, and are open to appeals from the Provinces. In the rest of the Indian Empire such independence is rendered simply impossible by the tribunals being presided over by members of the Government Civil Service, who are subject to the immediate control of the Executive. In certain Provinces the Judges are actually Executive officers vested with Judicial powers ; and the result of this anomalous system is that appeals from decisions given under official pressure are obstructed by the Executive, and prevented for years from being heard and determined in a

High Court. Authentic illustrations of this state of things will be found in the *Law Magazine and Review*, No. CCLXXXIV., for May last, under the heading of "*The Fusion of Executive and Judicial Powers in India.*"

Under such circumstances it will easily be understood that the right of appeal to a High Court is held in the highest estimation by the people of India, who look to it, not only for an impartial and enlightened decision of their suits, but also for a wholesome control over the proceedings of the subordinate tribunals throughout the country. Unfortunately, such control is seriously impeded by the action of the Executive in the manner just alluded to, and by the numerical disproportion existing between the High Courts and the establishments which they are expected to control. For example, in the Bengal Presidency in 1889-90, the District and inferior Courts determined 491,298 cases, while the High Court disposed of 4,636 appeals and applications, leaving 3,654 cases pending. (*Blue Book* 250 of 1891.)

That so unsatisfactory a state of things as has been mentioned above should prevail in a country where we have long prided ourselves on having gained the confidence of the people by our impartial administration of justice, is due to causes which a short retrospect into the history of our Judicial administration in that country may suffice to explain.

In 1726 Mayor's Courts were first established by Royal Letters Patent at Calcutta and Bombay, and the Regulating Act of 1772 constituted the Supreme Court of Bengal for the purpose of affording to British subjects in India the protection which the East India Company's Courts, founded on native law and native procedure, were incapable of providing. Later, Supreme Courts were established in Madras and Bombay, and these, with the Supreme Court at Calcutta, always remained Crown Courts, their Judges being members of the English Bar, nominated to the Bench by the Crown.

On the other hand, the Native system of administration, adopted by the East India Company, was based on the union of all authority—Judicial, Fiscal, and Military—in the same hands; a system which is said to have worked successfully while the rulers and the people were of the same races, spoke the same languages, and obeyed the same code of morality, but which was unsuitable for an alien Government on whom the restraining influences of race and education were entirely wanting. Modifications in the Company's system were introduced from time to time. Under Warren Hastings, an English Collector of Revenue, aided by a Native assistant, dispensed in each District both Civil and Criminal Justice, and appeals lay from these so-called "District Courts" to two *Sudder* Courts, the one in Civil, the other in Criminal cases. In 1774 Provincial Councils or Courts, presided over by three Judges, were created with appellate jurisdiction, and further changes were introduced later; meanwhile a conflict arose between the Civil and the Judicial authorities in Calcutta, and the 21 Geo. III., c. 70, which settled the contentions, constituted a Court of Record, with appeal to the King in Council. In the East India Company's Courts, however, no important departure from the native system occurred until 1793, when Lord Cornwallis effected a separation of the Judicial from the Executive functions of the State, by depriving Executive officers of their Judicial powers, and rendering them amenable to Courts of Judicature, which he then created and placed under the superintendence of Judges wholly uninterested in the result of their decisions.

This was the first attempt at fostering Judicial independence in the Courts of the East India Company; and its success was both rapid and far-reaching. The change, however, was most distasteful to the Executive, whose power it curtailed and regulated; and as the Indian Legislature was then, as it still is, entirely in the hands of

the Executive, new changes were enacted after Lord Cornwallis's retirement, which completely subverted the sound principles of his legislation. The Civil Jurisdiction of the Provincial Courts was abolished, Criminal Jurisdiction was conferred on the Civil District Judges, and Magisterial authority on the Collectors of Revenue. Great confusion and uncertainty arose soon afterwards from the multiplicity of the enactments, and an Indian Law Commission, with the late Lord Macaulay as its President, was appointed under 3 & 4 William IV., c. 85, for recommending reforms in the administration of Justice in India.

The first Report of the Indian Law Commission, with a Penal Code drafted by it, was submitted to the Government of India in 1837. The work was not considered satisfactory, and was recast by Mr. Drinkwater Bethune, who succeeded Mr. Macaulay as Legislative Member of Council in India. This second edition, however, was not more successful than the first, and the projected Code remained shelved until 1853, when a new Council of the Governor-General, of which the Chief Justice of Bengal was an *ex-officio* member, having been constituted by 16 & 17 Vict., c. 95, the work of Judicial reform was resumed and successfully concluded, through the labours of that eminent lawyer, the late Sir Barnes Peacock. The Penal Code, on the revision of which Mr. Peacock bestowed years of the most devoted attention, was read for a third time and passed in 1860, when it was declared in the Council *nem. con.* that "the Code could be safely adopted as the universal law of India." It may be said that our Judicial administration in India had then attained its highest level.*

* It would be a mistake, no doubt, to ascribe the failure alike of Lord Macaulay and of Mr. Bethune in framing a Penal Code, to any want of legal acumen, seeing that they had to perform their task, not as independent

Meanwhile the aggressive policy of annexation pursued by the Government against our Indian allies and feudatories, resulted in the lamentable disasters of 1857-8, and eventually in the transfer of the Government of our great dependency from the East India Company to a member of the British Cabinet. The virtually irresponsible system of administration, which was then adopted for India, struck a heavy blow at Judicial independence. The Secretary of State for India, in whom were centred all the powers that had been exercised by the Court of Directors and the Board of Control, was made responsible only to Parliament, where India has no direct representation; and the "Indian Councils Act, 1861," by removing the Chief Justice from the Governor-General's Council, left the Legislature entirely under the control of the Executive. The 24 & 25 Vict., c. 104, which abolished the Supreme and *Sudder* Courts, and conferred their jurisdiction on the present High Courts, struck another blow at the independence of the Judicial Bench in India, by ruling that, while one third of the Judges of a High Court may be English Barristers, the remaining two-thirds may consist of Civil servants of the Government and of Pleaders of Courts where the law administered and the procedure in use differed materially from those of Crown Courts. It must be admitted, however, with regard to the civilian Judges appointed under that Act, that the healthy atmosphere, which they breathed in their new sphere of action, soon revived that spirit of fairness and independence which is innate in the great majority of Englishmen. Unfortunately, however, some of the number seemed unable to throw off the trammels of

lawyers, but in consonance with the views, and subject to the influence, of the Government of which they were the servants; while Sir Barnes Peacock's independent position as Chief Justice placed him beyond the reach of all such influences.

their previous official training, an evil which was aggravated by the allurements of promotion in the Executive service, which was, at the same time, held out by the Government. An unseemly conflict then ensued between the Executive, who seemed determined upon arbitrarily interfering in the proceedings of the Law Courts, and a number of the High Court Judges, who stood up for the supremacy of the Law.

The Criminal Code and the Code of Criminal Procedure, as revised by Sir Barnes Peacock, proved invaluable instruments in the hands of the High Courts, for redressing wrong decisions on appeal, and for guiding Sessions Judges and Magistrates, who labour under special difficulties in the due discharge of their functions, owing to the following circumstances connected with the Police. In a country where the rulers and Englishmen generally hold no social intercourse with the Natives, the Police have exceptional opportunities, through misrepresentation, threats, and violence, to extort money from the ignorant, the timid, and the unprotected; and a great proportion of this nefarious income is derived from witnesses in Criminal cases. The Police are allowed to arrest all persons as witnesses whom they may believe to be possessed of information regarding the case in hand. Murders and minor crimes, and even accidental deaths, thus furnish particular opportunities for extortion. Among the persons taken up as witnesses, all who have any pecuniary means willingly pay to escape the usual ordeal, which consists in witnesses being, at the discretion of the Police, marched in custody to the nearest Magistrate's Court (which may be ten miles away), and thence to the Court of Sessions, their incarceration often lasting several months. The recalcitrant and the poorest, who remain in the hands of the Police, are then tutored (and tortured when necessary) as to the evidence required of them. The Police generally being the prosecutors, are interested in procuring a conviction; and this they have

little difficulty in accomplishing, so long as their criminal methods of producing evidence are not interfered with.

Those unacquainted with India, to whom the above statement may seem to require confirmation, will find such confirmation in the Administration Reports of the Government itself, no less than sixteen police officers having been found guilty of inflicting torture in the Province of Bengal, as stated in the Administration Report of that Province, published in 1878. When it is considered that a well-grounded fear of revenge has raised almost insuperable difficulties in the way of evidence being produced against the Police, the legitimate inference is, that the cases in which police officers have been convicted of torture, form but an insignificant fraction of those in which they have been guilty of the practice. The following are among the proved instances recorded in the above-mentioned Report. In Midnapore two constables were sentenced to five and two years' imprisonment respectively for crushing a woman under a heavy stone to extort a confession of guilt. In Hooghly two police officers got a year's imprisonment for torturing a woman to obtain evidence against her husband. In Nuddea a woman was so ill-treated that she killed herself, the constable present having been sentenced to imprisonment for a twelvemonth only, as evidence of his having taken an active part in the crime was not produced. In Mymensing a police officer and two constables tortured a man to death, and were sentenced to fourteen years' rigorous imprisonment. A remarkable case is that of a sub-inspector in Midnapore, tried for torture and let off by the Court, but departmentally degraded, whereby it became evident that his departmental superiors believed him to be guilty; a case in which one would think that he ought to have been dismissed from the Service. This is one of the many instances that have come to light of the extraordinary influence which the Police exercise over the heads of

the Department, and over Magistrates and Judicial officers generally.

Sir Barnes Peacock's Codes, which were framed with a knowledge of the practices just mentioned, inaugurated a new era in the administration of Criminal justice in India, with the result that trials began to shew an abnormally small proportion of convictions.

Now, the Indian Government, in the person of the Secretary of State for India, relies on favourable Administration reports for obtaining countenance and support in Parliament and with the public at home; and when the criminal statistics and the judgments of the High Courts exposed the hideous blots which disfigure the administration of Justice in India, the Executive became alarmed, and diligently set themselves to the task of satisfying the requirements of the Government regarding the tenor of the official reports. The blots complained of having come to light through appeals made to the High Courts, it was deemed expedient to prevent such appeals as much as possible. A "Criminal Procedure Amendment Bill" was accordingly introduced in 1870, which provided (in Section 5) that an Appellate Court should have power to enhance a sentence, and (in Section 272) that the Government may appeal from an acquittal, without limitation of time; that is, that a man may, for instance, twenty years after his acquittal, be re-arrested, tried and executed for murder. This was, indeed, holding an uneven balance between the Crown and the subject, seeing that the latter is limited to ninety-nine days for appealing from a conviction. A native Association thereupon represented in a Memorial to the Government that "they were not aware of any peculiarities in the constitution of Indian society which required this exceptional and almost vindictive power in the hands of the Government; that an acquittal was an acquittal, and that the order of the Court ought to receive the respect of the

subject and the Crown alike; that such legislation had the tendency to place the Executive in antagonism with the Judiciary, and to prove subversive of public morality and Judicial independence." Then, with regard to Section 5, the memorialists submitted that "the object of an appeal was to secure the ends of justice, and would be frustrated when the applicant was restrained from seeking the desired redress by a fear of the enhancement of his sentence."

These representations, supported by strong expressions of local public opinion, led to amendments prohibiting the enhancement of punishment on appeal, and limiting to six months the period in which the Government may appeal from an acquittal. The first of these two amendments was subsequently withdrawn, and protests against other objectionable features in the Bill were unheeded; finally, a new Criminal Procedure Code was passed in 1872, with many provisions which can be justified by no acknowledged principle and which all tend to prevent appeals from reaching a High Court. Section 64A empowers the Government to transfer any Criminal case from one Court to another Court of equal or superior jurisdiction; and Section 249 provides that when a witness is produced before a Court of Sessions, the evidence given by him before the committing Magistrate may, in the discretion of the presiding Judge, be treated as evidence in the case. Now, it should be borne in mind that the evidence produced in the Magistrate's Court is given when the witness has been, and still remains, in the custody and power of a notoriously corrupt Police.

The worst feature in the new Code is perhaps its system of summary trials. Under Chapter XVIII., Part V., a Magistrate is not hampered by any form; he may take whatever evidence he thinks fit, and then give his Judgment; he is not bound to record his reasons, and Section 227 provides that, in cases where no appeal lies (*i.e.*, where the

sentence is not more than imprisonment for three months, or 200 rupees fine), the Magistrate need not record the evidence of witnesses, his reasons for passing Judgment, or draw up a formal charge. Now, Magistrates have, not unfrequently, been found to have summarily disposed of cases which did not come under that Chapter : at the same time the right of appeal became nugatory, seeing that no records had been kept.

The Right Hon. Sir Richard Garth, late Chief Justice of Bengal, who zealously strove to raise the administration of Justice in that country from the low moral condition into which it had been allowed to sink, has recorded his opinion on the subject in a small book,* from which I take the liberty of quoting the following sentences, as they succinctly represent the actual state of things in India :—

“ When the functions of a Policeman, a Magistrate, and a Judge are all united in the same officer, it is vain to look for justice to the accused. Imagine an active young Magistrate, having heard of some daring robbery, taking counsel in the first place with the police, with a view of discovering the offender. After two or three vain attempts he succeeds, as he firmly believes, in finding the right man ; he then, still in concert with the police, suggests inquiries, receives information and hunts up evidence through their agency, for the purpose of bringing home the charge to the suspected person. He next proceeds to inquire, as a Magistrate, whether the evidence which he himself has collected, is sufficient to justify a committal ; and having come to the conclusion that it is, he tries the prisoner in his Judicial capacity without the assistance of a jury, and convicts him. The Police, upon whom the Magistrate is obliged to depend very much for his facts and information, are neither honest nor reliable. There is

* *A Few Plain Truths About India.* W. THACKER & Co. 1888.

always the fear that the charge against the prisoner may be the work of some wicked conspiracy. It sometimes happens that the Police themselves are engaged as the chief actors in making these abominable charges. To be tried by a man who is at once the judge and prosecutor is too glaring an injustice; and it is only wonderful that a system so indefensible should have been allowed to prevail thus long under an English Government."

Under the circumstances described in the foregoing pages it would be vain to look for Judicial independence in our Indian Provinces. Nature abhors vacuum less than Despotism hates independence on the Judicial Bench; and despotism of the worst type has been imposed by us on our fellow subjects in India. An Oriental despot is restrained in his rapacity by the fear of rebellion; no such fear can affect the ruler whom we have invested with despotic power, seeing that the whole military and naval forces of the British Empire stand at his back ready to crush any insurrectionary manifestation in India. Oriental despotism is mitigated by the sympathy which a common origin and a common faith create between the ruler and his subjects; no such sympathy can exist between our Secretary of State and the two hundred millions of Indians whom we have placed under his despotic rule. In Oriental Principalities and Kingdoms the fundamental laws of society and the principles on which they are based have descended from time immemorial, and are acknowledged as immutable by the sovereign and the subject alike; the *régime* imposed by us involves, on the contrary, an incessant change of legislation both in principle and in form; a condition of things which fills the popular mind with doubts, suspicions, and deep anxiety.

Lord Cornwallis's Regulations and the Codes of Sir Barnes Peacock, which were based on principles of equity, were received with gratitude and acclamations, and

awoke in the people a feeling of confidence in the intentions of their rulers; but those laws were soon blotted out of the Statute Book to make room for enactments which no principle of equity can defend, and which were obviously dictated by stringent fiscal exigencies. A single illustration may suffice to shew the nature of the enactments alluded to.

A landowner in the Presidency of Bombay, having appealed against the assessment imposed on his fields as exceeding the sum exigible under the regulations of the Government, and having obtained from the High Court a decision in his favour, the Government introduced a Bill, entitled the Bombay Revenue Jurisdiction Bill, removing from the cognizance of the Law Courts throughout that Presidency all matters relating to the land-revenue and the conduct of Revenue officers, and empowering the Revenue officers themselves to adjudicate in all such matters. The member in charge of the Bill urged, in defence of the measure, that "if every man is allowed to question in a Court of law the incidence of the assessment on his field, the number of cases which might arise is likely to be overwhelming." The Bill was passed in 1875 in spite of the protests entered by the people, and landowners have thus been deprived of the means of obtaining redress for illegal exactions of Fiscal officers.

It might appear superfluous to add that a most perilous situation has thus been created, were it not for the heavy calamities which ensued from a similar situation thirty-five years ago, and for the unpreparedness in which the Government and the public were overtaken by the catastrophe on that momentous occasion. The policy of spoliation, euphemised under the name of annexation, was allowed its course unrestrained by protest or remonstrance until we were startled by its results, and horrified by the massacres and outrages committed on Englishmen and Englishwomen, and by the amount of blood and treasure

that had to be expended before British rule could be restored in India. The authors of that policy, unfortunately, escaped punishment ; they succeeded in averting the wrath of their countrymen from themselves to those fiends in human shape whom their action had evoked—to the Nana Sahib and others whose worst passions were called into play by the thirst for revenge which our adoption of an unprincipled policy had kindled in India.

JOHN DACOSTA.

Postscript.—The scope left for Judicial independence in India is, we are sorry to find by recent news from India, threatened with further contraction by a measure which the Government has been elaborating for two years, and is about to bring forward for enactment. A Bill (bearing the remarkably vague title of "The Madras City Civil Court Bill") proposes to transfer, from the High Court to the Small Cause Court, jurisdiction over all suits up to a certain limit of pecuniary value, which may arise within the local limits of the High Court's original jurisdiction, except Testamentary, Matrimonial, and Maritime suits ; and it empowers the Government, at the same time, to raise the pecuniary limit to any larger amount, by notification in the Official Gazette. This proposition assumes that the Indian Legislature (which is, in fact, the Executive) can lawfully deprive the High Court of a jurisdiction conferred upon it by Letters Patent, granted under an Act of Parliament ; and it accordingly places the jurisdiction of that Court at the mercy of the Government.

The Judges of the High Court of Madras have protested against this design of the Government to interfere, indefinitely and whenever it may see fit, with powers and

privileges conferred by Royal Letters Patent; and their Minute, in conclusion, strongly "condemns the proposals to place the continued existence of the original side of the High Court at the discretion of the Executive Government, and to limit the liberties and privileges of suitors in Madras, and to deprive them of the right they possess of suing in the High Court."

The history of the last thirty years does not encourage the hope that the Government will recede from the illegal position which it has taken up in the above matter; at the same time, it should not be forgotten that the remedy for the evil lies in the hands of the High Court itself, and, in a measure, in the support it receives from the Public, who are deeply interested in keeping our Judicature free from the control of the Executive. It may be remembered that, some thirty years ago, an India Viceroy presumed to direct that a certain order issued by the Chief Justice of Bengal should not be executed. Sir Barnes Peacock, the Chief Justice referred to, lost no time in issuing a proclamation closing the Law Courts throughout the Presidency, on the ground that the Government had illegally interfered with the course of Public Justice. The ill-advised step taken by the Viceroy was speedily retraced.

J. D.

* * * [It will, we trust, be obvious to our readers that both the present Article and its predecessor from the same pen deal with questions of the gravest importance from the point of view of Constitutional Law, affecting the inhabitants of the United Kingdom no less than their fellow-subjects of the Indian Empire, and it is from this point of view that we have been glad to give them the

prominence which they deserved. The student of Constitutional History can scarcely fail to remember how intimately the question of the Independence of the Judicial Bench was bound up with the whole body of Constitutional questions at issue between the Crown and the Nation during the Stuart Period. The dismissal of Coke, C.J., was directly due to his resolute maintenance of the principle of Judicial Independence, and although the nominal issue raised in the Ship-money case might at first sight have seemed but a question of £. s. d., it involved, in point of fact, the same question as that of the "auricular" taking of the minds of the Judges before the delivery of their Judgment in Court, which Sir Edward Coke so strenuously resisted as absolutely fatal to the Independence of the Judicial Bench. It is not necessary to suppose any design on the part of the Government of India to revive, in the Indian Empire of Her Most Gracious Majesty, Jacobean and Caroline modes of Government, such as might have been suitable enough for it under a Mogul Emperor. It is only necessary to point out what a long and disastrous conflict such courses led to in this country, and what a perpetual protest against those courses has been, thanks to Sir Edward Coke, enshrined among the great Landmarks of our Constitution.—ED.]

II.—PRIVATE INTERNATIONAL LAW OF DIVORCE.—IV.

JURISDICTION (*continued*).

THE cases said to be opposed to the doctrine that International Law requires as a condition precedent to the exercise of jurisdiction that the domicile of the parties shall be within the territory of the country or Court are five in number. With respect to them we must remark, firstly, that there is no principle common to them, and, secondly, that they are irreconcilable with each other and with the rest of the cases. It will be the object of the next paragraph to prove the truth of the remark.

No single rule can be extracted from these cases, for they establish two distinct grounds of jurisdiction, viz., English origin, and *bonâ-fide* residence in England: and it requires a fair amount of ingenuity to reconcile them. The first two, *Deck v. Deck*, 1860, 2 Sw. & Tr. 90, *Bond v. Bond*, 1860, 2 Sw. & Tr. 93, seem to hold that the nationality of the parties regulates the jurisdiction of the English Court; the other three cases, *Brodie v. Brodie*, 1861, 2 Sw. & Tr. 259, *Santo Teodoro v. Santo Teodoro*, 1879, 5 P.D. 79, *Niboyet v. Niboyet*, 1879, 4 P.D. 1, regard the nationality as an unimportant factor in determining the question of jurisdiction, and consider *bonâ fide* residence as sufficient for the purpose, whatever be the allegiance of the parties. In *Deck v. Deck*, two natural born English subjects had married in England. The husband afterwards deserted his wife and went to America, acquiring a domicile there. The wife, who had been resident in England throughout, petitioned the Court for a divorce,

which the Court granted on the ground of the nationality of the parties being English. "Both parties were natural born English subjects; both, therefore, owed allegiance to the Crown of England and obedience to the Laws of England. That allegiance could not be shaken off by a change of domicile; the husband, therefore, though he became domiciled in America, continued liable to be affected by the laws of his native country." The fallacy in this case lies in the assumption of an indelible connection between the allegiance owed to the Crown and the liability to obedience to English Law. There is no such connection between them. It is true that at that time natural born Englishmen or Englishwomen could not throw off their allegiance to the Sovereign, but it did not follow that they therefore remained subject to English Law, even when they had abandoned their original domicile. If two English persons married in France, was the validity of this marriage to be determined by the Law of England on the ground that, being natural born subjects, they were liable to English Law? If they died domiciled in France, was their succession governed by English Law? If the Law of France applied in both cases, that is, if the parties, while still retaining their allegiance, could yet throw off (with the help of the English Court) their obedience to English Law, what becomes of the argument that "the husband, therefore, though domiciled . . . continued liable to . . . laws of his . . . native country?" This case confounds political status with civil status. In England the law governing the civil status (*e.g.*, marriage, divorce) is the *lex domicilii* not the *lex originis* (Lord Westbury in *Udny v. Udny*, *Shaw v. Gould*). Contrast the language of the Court in *Deck v. Deck* with that of Sir James Hannen in *Briggs v. Briggs*, 1880: "In these circumstances it appears to me that it is not established that at the time of commencing proceedings for divorce he had *freed himself from the*

restrictions of the English Law by abandoning his English domicile and acquiring a domicile in Kansas." This principle was followed in a subsequent case, but has never been heard of since, and would not be adopted now. *Deck v. Deck* cannot be harmonised with *Ratcliff v. Ratcliff*, 1859, *Tollemache v. Tollemache*, 1859, *Palmer v. Palmer*, 1859. The principle of these cases is that jurisdiction depends on domicile. The authority of the English Courts was upheld in *Ratcliff v. Ratcliff*, not upon the nationality of the parties (though that fact was alluded to), but upon the domicile of the husband. In *Tollemache v. Tollemache*, *Palmer v. Palmer*, the Court inclined to the view that a foreign Court could have dissolved the English marriage if the parties had been domiciled in the foreign country. In neither of these two cases was it attempted to place the English jurisdiction on the point of nationality; the domicile alone was mentioned and inquired into, the English allegiance of the persons not having been even adverted to. *Bond v. Bond*, 1860, 2 Sw. & Tr. 93, was said to be substantially the same as *Deck v. Deck*. The wife was English, but the origin of the husband was not definitely known. The Court said: "If the evidence on this point had been so cogent as to compel the Court to take notice that the respondent was not English, we must have decided whether or no the Court can, consistently with International Law, assume a right to adjudicate on a petition presented against a foreigner who is served abroad with a citation, to which he does not appear," and, presuming he was English, pronounced for the jurisdiction. So far as the *ratio decidendi* of the case is concerned, it is open to the same objections as *Deck v. Deck*, but it ought to be noticed that the husband was here considered to be of English domicile (whereas in the former case the husband was domiciled in America). Ignoring the principle of nationality, *Bond v. Bond* may be defended on the ground of the English domicile, and then it would be

consistent with *Ratcliff v. Ratcliff* and *Wilson v. Wilson*. The next case is an ambiguous one, and has excited much controversy. A Scotchman by birth married an Englishwoman in Tasmania. The parties went to Australia and settled there permanently. The husband came to England and resided here, having sold his house in Scotland, and in the meantime the wife committed adultery. The full Court, in giving judgment, said: "We say nothing as to what the effect of the evidence might be in a testamentary suit. We think it has been established that the petitioner is *bonâ fide* resident in England, not casually, or as a traveller. After he became resident here his wife was carrying on an adulterous course in Australia. He is therefore entitled to a decree." Two different constructions have been taken of this case. The first view is that it establishes the rule that *bonâ fide* residence of the husband, not casually, or as a traveller, is sufficient to give the English Court jurisdiction though he may be domiciled abroad. This conclusion is justified by the Judgment taken by itself as found in *Swabey and Tristram*. It is, however, open to several grave objections. The doctrine thus contended for is novel, and opposed to the principle of the other authorities, in none of which had the case ever been decided on residence apart from domicile. Again, it is difficult to see how the Court had jurisdiction over the wife.

- She was domiciled abroad (her husband being domiciled there), and had never been in England since her marriage, and had committed adultery abroad. If her husband was domiciled abroad, to use the words of one of the learned Judges who formed the Court, this is a suit against a person "who is not, and was not, at the commencement of the suit, within the Kingdom of England, who never," since her marriage, "had any residence in England, who never owed obedience to the Laws of England except during the period of *her* residence" before marriage, "and who is

not said to have done anything in England contrary to those laws." There is no such rule known, either to English Law or International Law, as that the *residence* of the wife follows that of the husband. By construction of law the *domicile* of the wife is the same as that of her husband, and it would in this case be Australian, and hence the assumption of power over her was arbitrary. Had the husband been domiciled in England this difficulty would have vanished. The judgment of the Court also makes a peculiar difference between domicile for the purposes of succession, and domicile for the purpose of matrimonial jurisdiction, as if there could be two kinds of domiciles. This notion has been happily repudiated since by every Judge,—(*Wilson v. Wilson, Manning v. Manning, Niboyet v. Niboyet, Brett, L.J.*), and would hardly be advanced now by anyone. The other view, and probably the true one is, that the husband was in reality domiciled in England, and that the Court did actually found the English jurisdiction on that fact. The whole report certainly shews this to have been the case. It was at first tried by Cresswell, J., who refused to grant a divorce on the ground that the parties were domiciled foreigners, and had cohabited abroad, where also the adultery took place. But on the application of Counsel that he could produce evidence that the husband's present domicile was in England, the hearing was adjourned. Evidence was brought before the full Court tending to establish an English domicile, and the Court said: "The question is whether the petitioner has acquired an English domicile; what sort of domicile must he have to make the wife domiciled here, she never having been in this country since the marriage?" Dr. Phillimore replied, that enough "had been proved to establish domicile for the purpose of founding jurisdiction, whether it would be sufficient for other, *e.g.*, testamentary purposes, may be another question. There is a *bonâ fide* residence in this country with the

intention of its being *permanent*." Then the full Bench gave judgment. There is a noteworthy point about this judgment. It follows almost *verbatim* the words of the Counsel, Dr. Phillimore, who based his case upon the domicile of the husband, on the residence in this country being *permanent*, and hence the meaning of the Court must have been the same. The report in 30 L.J. P. & D. 135, shews this view to be correct. "We say nothing as to what would have been our opinion if this evidence had been adduced in a testamentary suit as proof of the acquisition of an English domicile. We think it has been established that the petitioner is residing in England, not casually, or as a traveller, but *bonâ fide* and *permanently*, and that after he became so resident his wife committed adultery in Australia." The expression "residing not casually, or as a traveller, but *bonâ fide* and *permanently*" is identical with "domicile." It is very probable that the word "*permanently*" has, by an oversight, been omitted in the report of Swabey and Tristram. The Court must have thought that domicile was proved, for they carefully left open the question whether the evidence, on account of its scantiness, would be sufficient to prove an English *domicile* in a testamentary suit. If, then, *Brodie v. Brodie* went upon the principle of domicile, and it has so been regarded in *Gillis v. Gillis*, 1874, L.R. & Eq. 597 (Ir.), *Duggan v. Duggan*, 1877, 64 L.T. 152 (Australian), *Niboyet v. Niboyet*, Brett, L.J., it is perfectly consistent with *Ratcliff v. Ratcliff* and *Wilson v. Wilson*. If the first view is correct, however, it is a case which, though apparently followed in *Burton v. Burton*, 1873, was disapproved of by Lord Penzance in *Manning v. Manning*, *Wilson v. Wilson*, and by Brett, L.J., in *Niboyet v. Niboyet*. But it was unnecessary to consider the point in *Burton v. Burton*, and the silence of Cotton, L.J., in *Niboyet v. Niboyet* is significant, as it is not likely he would have ignored the case, if it had supported jurisdiction upon *bonâ fide* residence.

In *Brodie v. Brodie* the Court for the first time exercised jurisdiction over a foreigner, with respect to which point it had doubted its jurisdiction in *Bond v. Bond*. In 1879 was decided *Santo Teodoro v. Santo Teodoro*. The *ratio decidendi* of this case was not stated in the Judgment, and it seems to conflict with all the previous decisions. It apparently belongs to the same class of cases as *Deck v. Deck* and *Bond v. Bond*, but cannot be explained by either of them. In those two cases the wife was an Englishwoman at the time of the suit, and the husband was English, and hence jurisdiction was sustained on the principle of allegiance. But here the wife had lost her nationality by her marriage according to the Naturalisation Act, 1870, and the husband was a foreigner domiciled abroad, and the English Court could not ground its jurisdiction on that point. Nor can it be explained by *Brodie v. Brodie*, for this case decides either that the husband was domiciled in England or *bonâ fide* resident in this country at the time of the suit; whereas in *Teodoro's* case the husband was domiciled and resident abroad at the time of the suit. It can just as little be classed with *Niboyet v. Niboyet*, where the husband had a *bonâ fide* residence in England, and the "matrimonial home" was here, and the offence committed also here. In *Santo Teodoro v. Santo Teodoro*, the *bonâ fide* residence and "matrimonial home" were not in England, and the adultery took place on the Continent. The legal "matrimonial home" of the parties, or their "domicile," was always Italian. Down to 1872, they had a *de facto* "matrimonial home" (which is the kind of "matrimonial home" meant in *Niboyet v. Niboyet*) partly in England, and partly in Italy. After 1872, the parties having separated, there was not even a *de facto* "matrimonial home" in England; and hence, according to *Niboyet v. Niboyet*, the English Court had no jurisdiction. Some mention was made of the long cohabitation

in England; but whether the wife be English or Foreign the Court has no jurisdiction in the case of a domiciled foreigner who had been at some time or other in England, but had quitted the country before the divorce proceedings commenced. (*Yelverton v. Yelverton*, 1859; *Firebrace v. Firebrace*, 1878.) The Court also said that the petition and citation had been served; but mere service on a foreigner abroad does not give jurisdiction. Finally, we have left the case of *Niboyet v. Niboyet*, 1879, 4 P.D. 1. A natural born Frenchman, domiciled in France, married an Englishwoman at Gibraltar. For several years he was *bonâ fide* resident in England with his wife, in the discharge of his duties as a Consular officer. The adultery and the greater part of the desertion occurred in this country. He was in this country at the time the petition and citation were served on him, and appeared under protest. The Court of Appeal (Brett, L.J., diss.) reversed the decision of the Divisional Court, and laid down the following propositions: (1.) That the English Court has jurisdiction where and while the matrimonial home is English and the wrong done here. How far the fact of the wrong being done in England weighed with the Judges cannot be very accurately determined, but both Lords Justices laid stress on that circumstance. Cotton, L.J., adverted also to the presence of the parties in England and service here. (2.) That it has no jurisdiction where the matrimonial home is in a foreign country; that the Act does not apply to foreigners resident and domiciled abroad. (3.) That domicile is not necessary to found jurisdiction under the Act. At the end of his judgment, James, L.J., said he was not overruling any case, but it is really difficult to see how this decision does not seriously affect some other cases. If the decision in *Brodie v. Brodie*, 1861, turns upon residence and not domicile, it cannot stand any longer, for in that case the matrimonial home of both parties was not in England, and the adultery was committed in Australia.

In *Deck v. Deck* the husband had deserted his wife, and neither in law nor in fact was the matrimonial home or the offence in England, though the parties were English. The case of *Niboyet v. Niboyet* has been severely carped at in recent times. Even James and Cotton, LL.JJ., recognised that it was difficult to reconcile it with International principles, when the subject of the effect of a foreign divorce in England was discussed in *Harvey v. Farnie*, 1880, 6 P.D. 35. And it is very remarkable that Lords Selborne and Blackburn in the same case spoke in guarded terms of *Niboyet v. Niboyet*, refusing to give any opinion either way. It is certainly very much to be regretted that it did not go up to the House of Lords. The inconsistency of the case with the tenor of the later English decisions has been sensibly felt, and though the Lords Justices did not intend it to be so considered, the rule has been said not to extend beyond the circumstances that were before the Court. (*Harvey v. Farnie*, 8 App. C. 43, Selborne, L.C.; *Turner v. Thompson*, 1888, 13 P.D. 37.) It has, however, been followed by Butt, J., in *Ingham v. Sachs*, 1886, 56 L.T. 624, a decision as questionable as the authority it follows. The Judgment of the majority of the Court considered by itself has been strongly criticised by English jurists. "It is quite plain that if this is the true effect of the decision animadverted on, it is absolutely destructive of the whole principle upon which International Law, public as well as private, is based:" Foote, *Law Magazine and Review*, No. CCXXXII., May, 1879; and again, in his *Priv. Int. Jurisp.* (last edition), p. 95, he says: "To admit that . . . 'residence' in England *quâ* Consul could not be 'domicile,' and then to attribute to that 'residence' all the consequences which domicil usually carries with it, was an essentially 'insular' mode of recognising the existence of international law." Both James and Cotton, LL.JJ., seem to have thought that the Ecclesiastical

Courts based their jurisdiction, not on the domicile of the parties, but on their residence within the diocese. The jurisdiction of those ancient Courts was regulated by the statute 23 Henry VIII., c. 9. It was expressly limited to persons "dwelling or inhabiting" in the diocese. In *Collett v. Collett*, 1843, 3 Curt. 726, it was held that the statute requires permanent residence in the diocese, or general habitation in the place in which the jurisdiction of the Ecclesiastical Court is founded, and the domicile was relied on also in *Butler v. Dolben*, 1750, 20 Ecc. 352; *Tenducci's* case, 1775, 3 Curt. 731; *Chichester v. Donegal*, 1822, 1 Add. 5; *Carden v. Carden*, 1837, 1 Curt. 558; *Whitcomb v. Whitcomb*, 1840, 2 Curt. 351; *Williams v. Dormer*, 1852, 2 Rob. Ecc. R. 235. As to *Dasent v. Dasent*, 1849, 1 Rob. Ecc. 800, *vide Yelverton v. Yelverton*, 1859, Cresswell, J., and *Burton v. Burton*, 1873, Hannen, J. So far from ignoring the domicile of the parties (the secular domicile, as James, L.J., terms it), it was in those very Courts that the notion of domicile was developed in connection with succession, and they were guided by the same rules of International Law as the Courts created by the statute. (*Yelverton v. Yelverton*.) In truth the consideration of the jurisdiction of the older Courts to grant any relief at all, is beside the question whether or not the Act gives authority to do something else, for the jurisdiction transferred to the new Courts was in respect of the causes therein specified, of which divorce *à vinculo* could not have been one, the 27th sect. creating a proceeding unknown to the Courts of the land before. The preamble of the Act expresses that its object is "to constitute a Court with exclusive jurisdiction in matters matrimonial in England." But it is another matter to read it as "and in any *such* matrimonial matter in England it shall be lawful for any husband and any wife. . . ." as James, L.J., did. But the natural construction of the Act is that it vests all the ancient jurisdiction of the former

Courts in the new one, and confers on it a new power in certain cases specified in sect. 27. That the reading of the Act, as suggested by Cotton and James, LL.JJ., is wrong, is further evidenced by sect. 22. The argument that the principles formerly obtaining in the cases of divorce *à mensâ* are to hold now, in the case of divorce *à vinculo*, is directly contrary to this section, which enacts that the new Court shall proceed and give relief on principles conformable to those on which the Ecclesiastical Courts have acted in all suits "*other than proceedings to dissolve any marriage.*" The test laid down in the case in support of jurisdiction appears to be the existence of the matrimonial home in England, and the commission of the wrong in England. Both the Lords Justices mentioned these circumstances, and Cotton, L.J., alluded also to the presence of the respondent in England at the date of the suit and the service of the petition here. This proposition is open to much discussion. What is this "matrimonial home" which the learned Judges relied on so strongly? The "matrimonial home" is, in the eye of the Law, in the place where the husband is domiciled: "The home where they are to fulfil their mutual promises, and perform those duties which were the object of their union; in a word, their domicile." *Warrender v. Warrender*, 1835, 2 Cl. & F. 488; *Harvey v. Farnie*, 1882, 8 App. C. 43.) In this case the "matrimonial home" of the parties was, in point of law, in France. It is thus evident that the Lords Justices must have meant, by that phrase, a *de facto*, as opposed to a legal "matrimonial home"; an idea till then wholly unknown to English Law. But what if there is no *de facio* "matrimonial home" at all, as in the case of parties living separate in different countries? How can the doctrine of *Niboyet's* case apply then? With respect to the occurrence of the offence in this country, James, L.J., is not clear. He always connected the

matrimonial home in England with the offence in England, thus leading to the belief that both these circumstances were essential; but he admits that the English jurisdiction would not be lost by the delict taking place abroad, nor would it be founded by the crime occurring here during a temporary sojourn in England, while the matrimonial home was French. If the learned Judge thought that the wrong must be done here also to give jurisdiction, it is a principle which has never been heard of in England. (*Wilson v. Wilson*, *Ratcliff v. Ratcliff*, *Firebrace v. Firebrace*, *per* Sir James Hannen commenting on *Yelverton v. Yelverton* with reference to this point.) In *Hurley v. Hurley*, 1892, the adultery took place in this country, and hence the only question was whether there was a "matrimonial home," within the meaning of *Niboyet v. Niboyet*. This is a point which, no doubt, will yet have to be judicially settled at some time or other. Perhaps the only way of reconciling the conflicting parts of the Judgment of James, L.J., is to hold, that in his view, the "matrimonial home" alone was the essential condition of jurisdiction, and that when he speaks also of the offence having been committed here, he is merely referring to the actual facts of the case before him: in the event of which interpretation, his argument would be that Jurisdiction depends on an English "matrimonial home," and therefore that the English Court has authority *à fortiori* in a case where both the "matrimonial home" and the offence were in this country. The same remark applies to the introduction of the facts of the commission of the offence, of the presence of, and service of the citation on, the husband in England, which we find in the Judgment of Cotton, L.J. The doctrine of *Niboyet v. Niboyet* has been recently extended to the case of English persons, domiciled in Ceylon, but resident in England at the date of the suit, viz., *Hurley v. Hurley*, 1892. The most noteworthy difference between the two cases lies in this, that while in the earlier

case, there had been a very long residence in this country, in *Hurley v. Hurley* the parties had only been resident a year. Butt, P., was of opinion that, when once a "matrimonial home" was established, the Court would have jurisdiction, no matter how long or short the residence was prior to the suit. This conclusion, though following logically from *Niboyet v. Niboyet*, is nevertheless not in accordance with the proposal of Lords Selborne and Blackburn in *Harvey v. Farnie*, and of Sir James Hannen in *Turner v. Thompson*, to limit the application of *Niboyet v. Niboyet* to the exact circumstances of the case, viz., to such residence as would, but for a rule of law, constitute a domicile, presence of both parties, and service of writ in England at the time of the divorce proceedings.

The result of the entire series of the authorities may be shortly summed up. Domicile alone has been considered as the test of the validity of a foreign divorce according to universal law. With respect to English jurisdiction, the great mass of opinion is in favour of the application of the same principles, except five or six cases, and of the latter *Deck v. Deck* may be dismissed at once, as not likely to be followed now, and *Bond v. Bond* and *Brodie v. Brodie* explained in accordance with the general doctrines. *Santo Teodoro v. Santo Teodoro* may also be disposed of without further remark than this — that its *ratio decidendi* is not clearly expressed, and we cannot therefore be quite certain as to the principle involved in it. There remains only *Niboyet v. Niboyet*, and this case, besides being questionable upon its own merits, is against the *dicta* of eminent Judges and the opinions of Jurists, and, even if rightly decided, must be relegated to the class of exceptions involving peculiar circumstances. Considering the recent tendency of the Courts to adopt the view of the domicile, and especially the case of *D'Etchegoyen v. D'Etchegoyen*, in which an ominous silence was preserved upon the residence

theory, it is extremely probable that *Niboyet v. Niboyet* will be overruled, and a decision of the House of Lords sweeping away these five cases entirely is one which is very much needed, and would place the law on a satisfactory footing.

One final point remains to be discussed. We have seen that the English Court must have jurisdiction over both parties. The English domicile of the husband will attract the domicile of the wife, so as to give his personal law jurisdiction over the wife, though the marriage and offence were abroad, the parties cohabited abroad, and the wife was always resident abroad. (*Warrender v. Warrender*, 1835; *Brodie v. Brodie*, 1861; *Wilson v. Wilson*, 1872; *Gillis v. Gillis*, 1873.) Can a wife acquire a separate domicile in England so as to sue for a divorce when her husband is domiciled abroad? This involves the preliminary investigation whether a woman can acquire a domicile at all apart from her husband. The general rule of law, that the domicile of the wife is identical with that of the husband, and the grounds of the legal inference are both well put by Lord Brougham in *Warrender v. Warrender*, and Cotton, L.J., and Selborne, L.C., in *Harvey v. Farnie*. How far do peculiar circumstances create an exception (if at all) to the general proposition? The domicile of the wife living apart from her husband continues to be that of the husband (*Warrender v. Warrender*, 1835, 2 Cl. & F. 488; *Shaw v. Attorney-General*, 1870, L.R. 2 P. & D. 156; *Burton v. Burton*, 1873, 21 W.R. 648; *In re Cooke's Trusts*, 1887, 56 L.J. Ch. 637). The case of the wife separated from her husband under deed follows the same rule (*Warrender v. Warrender*, 1835, overruling *Tovey v. Lindsay*, 1813, 1 Dow. 117; *Re Daly's Settlements*, 1856; *Dolphin v. Robins*, 1859, 7 H.L.C. 390; *Burton v. Burton*, 1873; *In re Cooke's Trusts*, 1887). Whether or not a wife may acquire a different domicile after judicial separation, or desertion, is a question upon which a difference of judicial opinion prevails. *Williams v. Dormer*, 1852;

2 Rob. Ecc. R. 205; *Dolphin v. Robins*, 1859, *per* Lord Cranworth; *Le Sueur v. Le Sueur*, 1876, 1 P.D. 139; *Firebrace v. Firebrace*, 1878, P.D. 63, are cases in favour of regarding the wife as capable of acquiring a separate domicile after a sentence of Judicial separation; but there are opinions against this view equally strong. (*Warrender v. Warrender*, 1835; *Connelly v. Connelly*, 1851, 7 Moo. P.C. 438; *Yelverton v. Yelverton*, 1859; *Dolphin v. Robins*, 1859, *per* Lord Kingsdown; *Niboyet v. Niboyet*, 1878.) Similarly some Judges have thought it just to permit a woman to acquire domicile for herself when her husband has deserted her. (*Dolphin v. Robins*, 1859, Lord Cranworth; *Pitt v. Pitt*, 1864, 4 Macq. C. 27, Lord Westbury; *Le Sueur v. Le Sueur*, 1876; *Firebrace v. Firebrace*, 1878); but *contra*, *Dolphin v. Robins*, 1859, Lord Kingsdown; *Pitt v. Pitt*, 1864, Lord Kingsdown; *Yelverton v. Yelverton*, 1859; *Shaw v. Att.-Gen.*, 1870; *Niboyet v. Niboyet*, 1879. Although there are *dicta* in favour of the acquisition of a new domicile by the wife under such circumstances, yet the balance of opinion is against it. Perhaps the safest course is to leave both questions open. (*Pitt v. Pitt*, 1864, Lord Kingsdown; *Briggs v. Briggs*, 1880, 5 P.D. 153.) But now, assuming for argument's sake that a wife could, in such cases, acquire a different domicile, could she make the husband liable to the *lex loci* of her new domicile? So far as the decided cases go, a wife cannot so acquire a domicile in England as to render a foreigner, who had never been domiciled or resident in England, amenable to the law of the new domicile (*Le Sueur v. Le Sueur*, 1876; *Shaw v. Att.-Gen.*, 1870), nor a foreign husband who was domiciled and resident abroad at the time of the suit, but had previously resided temporarily here (*Yelverton v. Yelverton*, 1859); nor a husband domiciled abroad and of foreign origin who had quitted the country before the suit (*Firebrace v. Firebrace*, 1878); nor such husband merely present at the period

of the petition and citation. *Burton v. Burton*, 1873. Perhaps the only case in which the wife would be allowed to set up a fresh domicile would be under the circumstances mentioned by Brett, L.J., in *Niboyet v. Niboyet*, 1878. "The case of an adulterous husband deserting his wife by leaving his domicile, and assuming to domicile himself in another, might seem to raise intolerable injustice; but we cannot help thinking that in such a case, if sued by the wife in a country in which he had left her, he could not be heard to allege that that was not still the place of his married home, that is, for the purpose of that suit, of his domicile." The difficulty in the matter lies in this, that if the wife could acquire an English domicile in any case, and be capable of suing for a divorce, when her husband has always been domiciled abroad, the jurisdiction of the Court could not in any way be lawfully exercised over him, and its sentence would not be binding on him; the effect of the English divorce would be to dissolve the marriage only so far as the wife was concerned. The parties would be, so to speak, half married and half divorced. If the husband had been domiciled immediately prior to the divorce in England, and had abandoned his wife to avoid the suit, there might be some reason for the exercise of jurisdiction over him, his fraudulent acquisition of a foreign domicile being of no avail. There are no decided cases in England in which a wife has ever been allowed to set up an English domicile of her own, and then to sue her husband domiciled in another country. *Deck v. Deck* is not such a case, the decision turning upon the nationality of the parties; nor *Santo Teodoro v. Santo Teodoro*; for that case does not proceed upon the principle of the domicile of the wife in England, whatever else may be its *ratio decidendi*. In the absence of any such decision, we must take the English rule to be that the Divorce Court has jurisdiction when the parties are domiciled here; that is, when the husband is domiciled

here, the wife's domicile following his, but not when the husband is domiciled abroad.

In America it is now well established that a wife may acquire a separate domicile after separation *à mensâ*, and after desertion (*Harteau v. Harteau*, 1833, 14 Pick. 181), or whenever else it is necessary or proper that she should have such a domicile (*Cheever v. Wilson*, 1869, 9, Wall. 107), and may in such cases sue for a divorce. (*Cheever v. Wilson*, *Barber v. Barber*, 21 How. U.S. 582; *Vischer v. Vischer*, 12 Barb. 640.) The doctrine that the jurisdiction of the Court depends on the domicile of either party is now followed throughout almost the whole of the United States. In Pennsylvania, however, it has been held that the injured party in the marriage relation must seek redress in the *forum* of the defendant, unless where the defendant has removed from what was before the common domicile of both. (*Colvin v. Reed*, 55 Penn. St. R. 375, followed in *Reel v. Elder*, 62 Penn. St. R. 308.) These principles, however, have been rejected in England. (*Yelverton v. Yelverton*, 1859, Cresswell, J., and *Niboyet v. Niboyet*, 1878, James, L.J.)

E. H. MONNIER.

III.—FOREIGN MARITIME LAWS: V. PORTUGAL.

THE former Code of Commerce in Portugal was promulgated in 1833, at which date there was no Code of Civil Law in force, and therefore special provisions were contained in it about many matters and persons as to which the Civil Code, when promulgated in 1867, laid down general principles. It must often have been difficult, if not impossible, to reconcile the one with the other; moreover the exigences of commerce in the course of the last half century called on Portugal to follow the examples given by Belgium in 1880, Italy in 1883, and Spain in 1886, and get rid of obsolete arrangements, and bring the Mercantile Law down to date and into accord with the Civil Law.

The Code, the first part of which is translated below, was presented to the Cortes by Sr. Fr. Ant. da Veiga Beirão in 1887, and became law on 1st January, 1889.

It will probably be found convenient to give, at the end of the Maritime portion of the Code of Commerce, the Articles both of the Civil Code and of other parts of the Commercial Code bearing upon the *status* of foreigners and of foreign companies in Portugal.

The former Code was, to a great extent, identical—allowance being made for grammatical differences of construction between the two languages—with that which in Holland is still in force, whereas the present text inclines rather to the new Italian Code.

The references to the new Code already in force in Sweden, and which it is expected will soon become law in Denmark and Norway as well, and a translation of which is now appearing in this *Review*, are denoted by the abbreviation (Sc.) for Scandinavia.

It has been thought more convenient to publish the Swedish and Portuguese Codes in alternate sections, so that the same subjects may be dealt with nearly at the same time. The Swedish Code, being somewhat more minute in its provisions, and therefore larger, may probably require more than exactly each alternate number of this *Review*.

CODE OF COMMERCE. PORTUGAL.

BOOK III.—*Maritime Trade*.

TITLE I.—*Ships*.

CHAPTER I.

General Principles.

ART. 485. Ships are deemed to be chattels (*bens moveis*) for all legal purposes, except as modified or restricted by this Code :—

- (1.) Longboats, pinnaces, barges, furniture, apparel, arms, and stores intended for the use of a ship, are treated as part of a ship, and, if she is propelled by steam, her engine and its appurtenances.

B. Bk. II., 1, F. 190, G. 443, H. 309, I. 480, S. 576, 585. E. 4.

486. Those ships will be deemed national (Portuguese) for the purposes of this Code which are registered in accordance with the special Navigation Act.*

I.M.M.C., Ch. III., Sc. 2.

487. The possession of a ship without a deed of transfer confers no property in it.

B. Bk. II., 2, F. 430, H. 312, I. 483, R. 166, S. 573 diff.

488. Questions of ownership, and liens and loans upon a ship, are regulated by the law of the flag which the vessel carried at the time that the right, which is the subject in dispute, was acquired :—

- (1.) The same rule is observed in disputes relating to the privileged claims on freight or cargo of a ship.

* See Decree of 8th July, 1863.

- (2.) A change of nationality will not prejudice prior rights in respect of the ship, unless by International Treaty.

489. Shipbuilding contracts must be in writing :—

- (1.) An owner of a vessel which is being built may withdraw from the contract with the builder or contractor, on the ground of want of skill, or fraud shewn in the work.
- (2.) The Building Contract of a ship must state the agreed price.
- (3.) The provisions of this Article and its several clauses are applicable to contracts for heavy repairs (*grande reparação*) of ships and to all such as modify, alter, supersede or revoke building or heavy repairing contracts.
- (4.) That is deemed to be “a heavy repairing” contract for a ship when of such magnitude as to exceed half the value of the ship.

I. 482, Sc. 3.

490. Every contract for the transfer of a ship must be attested, or to be attested (*celebrado por escripto authenticico ou authenticado*) :—

- (1.) The provisions of clause (2) of the preceding Article are applicable to such contracts.
- (2.) If the transfer takes place in a foreign country, the title will be registered in the Consular Agency of the place where the ship, in respect of which the contract is made, is lying, or in that of the first port into which the vessel comes if there is no Portuguese Consular Agency at the place where the contract is made.
- (3.) The Portuguese Consular Agent must send a copy of the entry in his Register to the Secretary of the Tribunal of Commerce at the place where the ship is registered, by the first post.

- (4.) A contract for the transfer of a ship will be at once entered on her own register (*passaporte real*).

B. Bk. II., 2, l. 483, R. 166-168, S. 578.

491. A vessel, when bound on a voyage, cannot be arrested or distrained upon except for debts contracted to fit her out for such voyage, or on account of liability for a collision :—

- (1.) The arrest or distraint of goods or merchandise laden on a ship under the circumstances provided for in this Article will not authorise its discharge except on such terms as those on which the shipper himself has a right to demand it, such as payment to the person interested in the freight, and expenses of loading and discharging and unstowing and giving bail for the value of the goods.

F. 215, S. 584.

CHAPTER II.

Shipowners.

492. The owner of a ship is civilly liable :—

- (1.) For the acts and negligences of the captain and crew.
 (2.) For contracts made by the captain relating to the ship and voyage.
 (3.) For damages which occur whilst in tow and by reason of the tug.
 (4.) For default of sea or harbour pilots carried in the ship.*

§ 1. The liability under Clause (2) of this Article ceases on abandonment of ship and freight earned, or to be earned, save in the case of contracts for payment of wages to the crew.

* From this it appears that Portugal now follows England M.S.A., 1854, § 388, and Germany (740) as to the position of a pilot and the liability of shipowners for his acts.

As to § 2, see *The Quickstep*, 15 P.D. 196.

§ 2. The liability under Clause (3) of this Article (ceases), when from the peculiar nature of the towage the control of the ship belongs exclusively to the captain of the towing vessel; in such a case the owner is only responsible for the defaults of the captain and crew of his own ship.

§ 3. The liability under Clause (4) of this Article (ceases) when the sea or harbour pilot is on board in obedience to a local law on the subject.

B. Bk. II., 7, 228, 230, F. 216, G. 451, 452, 454, 68 (1872), H. 321, 322, I. 491, R. 253-255, Sc. 7, 8, S. 586-588.

493. An owner may dismiss the captain before the commencement of the voyage, without any compensation being due, unless he has by his contract reserved his right to demand it.

§ 1. If the captain is a co-owner, he may, in case of dismissal, give up his share, and demand its value.

B. Bk. II., 8, 9, F. 218, 219, H. 328, I. 494, R. 217, Sc. 11, S. 603.

494. The several persons interested in any maritime adventure may ask to be joined together as a partnership.

§ 1. The persons fitting out the ship may form such a combination, or they with the crew, or one or other of these classes with the shippers.

§ 2. The owners or charterers who fit out a ship are the *armadores*.

S. 589.

495. The provisions respecting ordinary partnerships (*sociedades em commandita*) and joint-stock undertakings, according to the form in which they are constituted, are applicable to maritime partnership in all respects in which they are consistent in principle and saving the provisions of the following clauses:—

§ 1. If the partnership is between the *armadores* and the crew, the captain is manager if no one is

specially nominated ; if it is with the shippers, the person most largely interested on board or his agent, and, if there is neither, then the captain.

§ 2. Unless otherwise agreed, the profit and loss will be distributed in a maritime partnership in proportion to the interest that each *armador* has, if an owner, in the value of the ship at the time of the contract, if a charterer, in the value of the cargo at price current at the time and place where the agreement is made, and if a member of the crew, in his share of wages and salary.

§ 3. The manager cannot undertake voyages, make new charter-parties, insurances, or order repairs, or make other expenses for which the partnership would be personally liable without their consent.

§ 4. The manager has, amongst other functions, the following :—

- (1.) To pay off and discharge the captain, unless he is a co-partner.
- (2.) To regulate the expenses of fitting-out, provisioning, and working the vessel during the voyage, and within the conditions of the charter-party.
- (3.) To insure expenses for repairs made during the voyage, and freight to be earned.
- (4.) To render to the co-partners at the end of each voyage an account of the partnership, and distribute the profit or loss.

§ 5. The partnership is liable to creditors and parties injured by the occurrences of the voyage for the acts of the manager, captain, and crew, with a right to recover over from these persons.

§ 6. This liability may be enforced against the respective shares of co-partners, and the earnings and wages of others.

B. Bk. II., 11, G. 460, H. 327-335, R. 177, Sc. 11, S. 598-607.

CHAPTER III.

The Captain.

496. The captain is the person entrusted with the command and conduct of the ship, and in that capacity is responsible for the defaults of the crew in the exercise of their duties.

§ 1. The responsibility of the master ceases in case of pure or unavoidable accident (*força maior*).

B. Bk. II., 12, 21, F. 221, G. (1872) 2, H. 341, I. 496, R. 216, S. 618, 620.

497. The captain is answerable to shippers for goods shipped in accordance with Bills of Lading, for injury sustained by those which are carried on deck without the consent in writing of the shipper, but not for valuables, money, and negotiable documents which are not declared in Bills of Lading.

§ 1. An endorsement in Bills of Lading that goods will be carried on deck, shews the consent of the shipper, unless he immediately protests.

B. Bk. II., 13, 20, F. 222, G. 479, H. 345, 346, I. 498, R. 227, S. 619.

498. It is the duty of the captain to form and engage the crew, in agreement with the charterers (*armadores*) or owners of the ship, if present, or of the consignees, if there are any.

§ 1. The captain cannot be compelled against his will to take any member of the crew into the service of the ship.

B. Bk. II., 14, F. 223, G. (1872) 10, 495, H. 343, I. 499, R. 256, S. 610 (1), Sc. 25.

499. The captain must keep on board :—

(1.) A passenger and cargo book.

(2.) An account book.

(3.) A log-book.

(4.) An inventory.

§ 1. The passenger and cargo book may be replaced by manifest and similar documents, provided they fulfil the conditions required by Art. 501.

B. Bk. II., 15, F. 224, H. 358, I. 500, S. 612, Sc. 35.

500. The ship's books will be paged and paragraphed by the Maritime Authority of the ship's port of registry.

§ 1. If it is necessary to renew any of the books when the ship is on a voyage or at a loading port other than her home port, the paging and paragraphing may be effected by the Authority of that port, or by the Portuguese Consular Agent.

B. Bk. II., 15, F. 224, I. 500, S. 612 (3).

501. The passenger and cargo book must contain the names of passengers and the places from which they come and to which they go; the description and amount of goods carried, distinguishing the packages by their numbers and marks; the ports of loading and discharge; the names of the shippers and receivers or consignees, and whatever other remarks the captain may consider necessary about the persons or goods on board.

I. 500, S. 612 (3).

502. The ship's account book must contain all receipts and expenditure on the ship's account, including the wages of the crew, such expenses as are occasioned by putting into a port, raising money on bottomry, and all other items of credits and debts for which the captain is liable.

B. Bk. II., 15, I. 500, S. 612 (3).

503. The log-book (diary of navigation) must contain a statement of the port from which the vessel sails, the manœuvres executed, the course pursued, the results of geographical, meteorological, and astronomical observations, the various occurrences of the voyage, damages

sustained, stating what articles are lost or abandoned, an entry of births and deaths on board, resolutions taken in counsel, and all other circumstances, both ordinary and extraordinary, happening in the course of the voyage.

B. Bk. II., 15, F. 224, G. 486, 487, H. 358, 359, I. 500, S. 612 (3), Sc. 35.

504. The ship's inventory must contain a list of the apparel, furniture, tools, and other articles of any sort supplied to the ship, and mention any alterations made in them.

I. 500, S. 612 (1).

505. The captain must have the ship surveyed before undertaking a voyage so as to know that it is seaworthy, except when less than six months shall have elapsed since the last survey.

§ 1. The provisions of this Article apply to foreign vessels leaving ports within the realm and its colonies.

§ 2. The ship's inventory must always be produced at surveys made in pursuance of this Article, to see that the spare stores mentioned in it are in existence.

§ 3. A Judge of the Tribunal of Commerce will preside at the survey, or, failing him, the Maritime Authority of the port.

§ 4. A survey establishes a presumption of seaworthiness of the ship, and, failing it, the captain is answerable to those concerned in ship and cargo.

§ 5. A survey does not free the person taking freights from liability if those concerned prove that the ship was unseaworthy in consequence of defects that were not visible.

B. Bk. II., 16, F. 225, H. 347, I. 502, M.M.C. 77-84, R. 228, 229, S. 612 (4), Sc. 26.

506. A captain must produce his log-book to the authority whose duty it is to legalise it, to be viséed, within 24

hours of his arrival at his port of destination, and in case of putting into port, shipwreck, or other extraordinary event happening in the course of the voyage, or causing damage to ship, cargo or passengers, must within the same term make a sea deposition before the same Authority, which will be supplemented by summary information derived from the crew and passengers if it is necessary to interrogate them.

§ 1. Parties concerned, or their representatives, without special procuration, and as agents, will be admitted to assist in the enquiry.

§ 2. Such sea depositions, supplemented by summary information, are sufficient evidence in a Court of Justice, unless the contrary is proved.

§ 3. The captain's answers or deposition, or sea protest, will be sufficient to produce a like effect when he alone is saved from the wreck and appears in the place where the deposition is made.

§ 4. The deposition must state the port and date of departure of the ship, the course pursued, perils encountered, damages sustained by ship or cargo, and, speaking generally, all the important events of the voyage.

B. Bk. II., 32-37, I. 516, S. 612 (8), (15), 624.

507. Except in cases of urgency or necessity, a captain must not commence to discharge the ship until his deposition has been made and approved.

B. Bk. II., 38, F. 248, I. 520.

508. The following are the captain's duties :—

- (1.) To receive, stow, preserve, and deliver the cargo properly.
- (2.) To weigh anchor with the first fair wind, as soon as everything is safe on board that is required for the voyage.
- (3.) To take the ship to her destination.

- (4.) To stay on board during the whole voyage, whatever the danger may be.
- (5.) To take a local pilot for all bars, coasts or districts where law, custom, or prudence require it, paying attention to the Port regulations.
- (6.) To summon in council the officers, *armadores*, managers, and shippers who are on board, or their representatives, on any important occasion whence damage may result to ship or cargo.
- (7.) To use all diligence to save and keep in good custody, money, goods and articles of value and mails and ship's papers when it is necessary to abandon the ship.
- (8.) In case of jettison, to sacrifice first articles of least value, those which are least necessary for the ship, those which are heaviest, and those which encumber the deck.
- (9.) In case of putting into a port of refuge, to carry out as far as it applies to him the provisions of Title VI. of this Book.
- (10.) To take all necessary precautions to preserve ship or cargo when captured, placed under embargo, or arrested.
- (11.) To take every opportunity during the voyage from ports he enters or is forced into to give the *armadores*, or managers, notice of the incidents of the voyage, of unusual expenses incurred for the benefit of the ship, and of any funds raised for the purpose.
- (12.) To produce the ship's books to those concerned who may desire to examine them, allowing them to take copies or make extracts.

- (1.) B. Bk. II., 13, G. 481, R. 238, S. 612 (5), Sc. 26, 53.
- (2.) G. 483, H. 354.
- (3.) B. Bk. II., 28, F. 238, H. 361, I. 514, M.M.C. 111, S. 610 (2), Sc. 62.
- (4.) B. Bk. II., 31, F. 241, S. 484, H. 362, I. 514, M.M.C. 111, R. 232, S. 612 (14), Sc. 29, 43.

- (5) H. 363, I. 504, R. 245, S. 612 (5).
- (6.) S. 485, H. 367.
- (7.) F. 241, H. 362, I., M.M.C., 111, S. 612 (14), Sc. 43.
- (8.) H. 368, S. 815.
- (10.) H. 364, 365.
- (11.) B. Bk. II., 25, G. 503, H. 360, 377, I. 511, S. 612 (12), Sc. 52.
- (12.) Sc. 39.

509. A captain is competent to represent owners or charterers in legal proceedings in any country, whether as plaintiff or defendant, and, moreover, being their agent in all matters relating to the management and the voyage of the ship, is at liberty to take any proceedings during the voyage and in foreign countries.

§ 1. When any of the owners or charterers of the vessel or their representatives are present, a captain may not, without their authority, give orders for repairs, buy sails, ropés or other apparel, arrange freights, or raise money on account of cargo.

B. Bk. II., 22, G. 496, H. 371, I. 510, S. 610, 611, Sc. 48.

510. A captain may, if it is absolutely necessary during the voyage, make use of cargo on board for the ship, after having consulted the principal members of the crew.

I. 508, S. 611 (5), 616.

511. If, in the course of the voyage, the captain needs money for repairs, purchasing provisions, or other necessities for the ship, he must at once give notice to the *armadores*, charterers, and receivers, to put him in a position to meet the expenses, or if he cannot give this notice, or there is not time to hope for a reply and remittances from those concerned, he may, being authorised by the presiding Judge of the Tribunal of Commerce, or if there is none, then by a Justice of the port, incur such expenses and raise the necessary money.

§ 1. If such a thing occurs in a foreign country, he will seek for the authorisation of the Portu-

guese Consular Agent, or, failing him, of the Judicial authority of the country.

§ 2. Such charges will be entered in the log-book, with a circumstantial account of them as well as of the vouchers.

§ 3. A captain, before he leaves a port where he has incurred unusual charges and contracted debts without the direct intervention of the owners or charterers of the ship, will send them a detailed account of such expenses, referring to the vouchers for them and for debts he has contracted, including, in respect of the latter, the name and address of the creditors.

B. Bk. II., 24, 25, F. 234, 235, H. 372, 377, I. 509, 511, S. 611.

512. The liability to shippers in respect of goods sold is for the value that they have at the place and time of the discharge of the ship.

B. Bk. II., 24, H. 377, I. 509, S. 659.

513. A captain may not sell the ship without the special authority of the owners, except in the solitary case of its being condemned as unseaworthy.

§ 1. The condemnation and sale of the ship will be ordered by the President of the Tribunal of Commerce or the Magistrate appointed for the purpose, and if the matter takes place in a foreign country, by the Portuguese Consular Agent, or, failing him, by the Judicial authority of the country.

§ 2. If a vessel is condemned as unseaworthy, it is the duty of the captain to charter another vessel to take the cargo to its destination.

§ 3. The duty of which the previous paragraph speaks ceases if a higher freight is demanded than the original vessel was earning, unless those interested in the cargo agree to the

increase of freight, which in such case will be on their own account.

B. Bk. II., 27, 94, 97, F. 237, G. 499, H. 376, I. 513, R. 250, S. 578, 579, 657, Sc. 50.

514. A captain may demand payment of his earnings and repayment of disbursements when the accounts are rendered.

§ 1. If there is a doubt as to the settlement of the accounts, the payment of the wages will be made against bail.

H. 388, S. 602.

515. The same rights and duties pertain to a person acting as captain.

G. (1872) 2.

CHAPTER IV.

The Crew.

516. The captain or master, the officers, seamen, and ship's boys borne on the muster-roll and shipped in accordance with the regulations, as also engineers, firemen, and other persons in the service of steamships, constitute the crew of the ship.

§ 1. The muster-roll must shew the name, rating, and domicile of each contracting party, and his wages and other conditions of service.

§ 2. This contract must be drawn up in writing before the proper Maritime head officer or his deputies, and in foreign countries before a Portuguese Consular Agent, who will then proceed to ship the crew.

§ 3. When the contract is made in a place where there is no Consular Agent, it will be entered and signed in the log.

F. 250, G. (1872) 3, 11, 12, H. 394, 397, I. 521, 522, M.M.C. 73, R. 257, 258, S. 634, 648.

517. Seamen and other members of the crew are bound to serve in the ship after the term agreed on has expired, for such period as is necessary to return to the port from which they sailed, such return to be direct and with only the necessary ports of call.

§ 1. In the case provided for by this Article, the crew have a right to the increment of pay corresponding to the longer period.

§ 2. The contract is deemed to be completed even before the time agreed on has expired if the ship has returned to her port of sailing and completed her voyage within such period.

G. (1872) 54, I. 524, S. 636, Sc. 82, 83.

518. If the contract with the crew is for an undefined period, or for all voyages that the ship may undertake, the crew can claim their discharge at the end of three years, saving the proviso of the preceding Article.

§ 1. If at such time the vessel is in a foreign country, and her return voyage is neither begun nor arranged, the crew have a right, over and above the wages they have earned, to be paid the expenses of their return home, unless the captain gets them a ship.

§ 2. No discharge can take place in a port of call or distress, but only in the port where the voyage terminates.

G. (1872) 61-67, I. 525, S. 637, Sc. 82, 83.

519. When the contract is terminated, or deemed to be terminated, and the seamen are discharged, the captain must give them a certificate of discharge, stating the name and description of the ship, and must enter this discharge in the log-book.

I. 526.

520. No captain or seaman can ship goods on his own account without the leave of the owners or charterers, or

without paying freight, unless it has been so agreed in their contracts.

B. Bk. II., 66, F. 251, H. 352, 410, I. 527, Sc. 28, 81.

521. The reciprocal rights and duties between captain and crew commence on the signing of the contract.

G. (1872) 28, H. 399, R. 266, Sc. 74.

522. If the voyage fails to be carried out in consequence of some act of the owner, captain, or charterer, the crew retain as compensation the advances made to them on account of their wages.

§ 1. If no advance has been received, a seaman engaged by the month will receive a month's pay as compensation. If shipped for the run, he will receive a sum corresponding to a month's pay, calculated on the probable length of the voyage, if this time is more than a month, or the whole of his agreed pay if the time be less.

F. 252, H. 411, I. 529, S. 638, Sc. 82.

523. If the voyage be abandoned after the vessel has sailed, a seaman shipped by the run is paid as if it had been completed; if paid by the month, he is paid for the months he has served, and gets compensation proportional to the probable length of the voyage, and in both cases he will be paid his expenses of returning to his home port, unless the captain gets him a ship.

F. 252, H. 412, I. 529, S. 638, Sc. 82.

524. If trade with the place to which the vessel is bound is prohibited in consequence of sanitary or police precautions, or if the vessel be placed under embargo by orders of Government, before the voyage is commenced, only the days actually occupied by the crew in fitting out the ship will be paid for.

B. Bk. II., 49, F. 253, G. (1872), 57 (5), H. 413, I. 530, S. 639, 640, Sc. 91.

525. If the prohibition of trade or embargo of the ship takes place during the voyage, the crew have a right in the first case to wages proportional to their length of service.

and in the second to half-pay during the time the embargo lasts, if paid by the month, and to the whole agreed sum, if they have contracted for the run.

B. Bk. II., 50, F. 254, G. (1872) 57 (5), H. 414, I. 531, S. 641, Sc. 91.

526. If the voyage is prolonged in the interest of the charterers, and the ship in consequence comes to a different port from that to which it was originally destined, wages agreed on for the run will be augmented in proportion to the prolongation of the voyage.

§ 1. If the vessel is discharged at a place nearer than that agreed on, the wages of the crew do not, on this account, sustain any abatement.

B. Bk. II., 51, 52, F. 255, 256, H. 441, I. 532, 533, R. 271, S. 638, Sc. 94.

527. If the crew have shipped on shares (*a partes*) they have no right to any compensation in respect of what happens in the course of the voyage, except their claim on the partnership.

B. Bk. II., 53, 55, F. 257, 260, H. 416, I. 534, S. 642.

528. In case of condemnation, or capture, or total loss of ship and cargo, no wages are due to the crew unless the freight has been paid in advance, but if they have received an advance it is not restored.

§ 1. If any portion of the vessel is saved, wages which have been earned have a preferential claim on the proceeds of the wreck, or on whatever is recovered from the prize. Moreover, if the objects which are salvaged are insufficient, or if only cargo is salvaged, the crew will be paid beyond this out of the freight.

§ 2. Whatever the nature of the agreement may be, the crew will be paid wages for days occupied in salvaging ship and cargo.

B. Bk. II., 54, F. 258, 261, G. (1872) 56, H. 418, 419, 421, I. 535, 536, R. 301-303, S. 643, Sc. 91.

529. A seaman who is wounded or maimed in the service of the ship in the course of the voyage will be paid his

wages for the whole period during which he is disabled, and also receives medical attendance at the expense of the ship.

§ 1. If the service to which this Article refers is a salvage service, the expenses of medical treatment are on account of ship and cargo.

§ 2. If the treatment is on shore (*i.e.*, if the man be in hospital) the captain will give the Portuguese Consular Agent the money required for such treatment, and for sending the man to his home port ; if there is no Consular Agent, the captain will take care that the man is admitted into a hospital or infirmary, by making the advance necessary for his treatment.

§ 3. If the seaman is landed, this treatment and payment of wages will not continue beyond four months.

B. Bk. II., 57, 58, F. 262, 263, G. (1872) 48, 49, H. 423-427, I. 537, R. 305-307, S. 644, Sc. 90.

530. If a seaman is wounded, or contracts disease, or is maimed by his own fault, or when on shore without the captain's leave, the cost of his treatment will be at his own expense ; nevertheless, the captain must advance such expenses if the seaman requires it, and he must proceed as laid down in the preceding Article when it is necessary to land the seaman, preserving his (the captain's) right to be repaid.

§ 1. In case the seaman is wounded, diseased or maimed by his own fault, wages are only due for the time he has actually been doing duty.

B. Bk. II., 59, F. 264, G. (1872) 50, H. 428, I. 538, R. 278, S. 644, Sc. 90.

531. If any seaman dies during the voyage, his representatives are entitled to his wages up to the day of his death, if he shipped by the month ; and if he engaged for a lump sum for the whole voyage, they are entitled to half

the sum if he died on the outward voyage, or at the port of destination, and to the whole if he died on the homeward voyage.

§ 1. If the seaman contracts for a share, then his share is due to his representatives, if he died after the voyage was commenced.

§ 2. If the seaman is killed in defending the ship, the whole voyage wages are due to him, whether shipped by the month or for a lump sum, if the ship reaches a port of safety.

B. Bk. II., 60, F. 265, G. (1872) 51, H. 429-431, I. 539, R. 308, S. 645, Sc. 93.

532. When a ship is captured, wages are due up to the day of capture.

§ 1. When seamen are made prisoners when away from the ship on duty, their wages are due for the period they do duty.

§ 2. The cargo contributes to this payment if the seaman was away from the ship in its interest.

B. Bk. II., 61, F. 266, 267, G. (1872) 56, H. 432-435, I. 540, S. 643.

533. If the ship is sold whilst the contract with the crew is in force, they have a right to be sent to their home port at the expense of the ship, and to receive the wages agreed on.

I. 541, R. 309, S. 647 (3), Sc. 88.

534. The captain may discharge a seaman before the end of the term agreed on without its being necessary to shew the reason of the discharge, provided he gives him his certificate of discharge, and the means to convey him to his home port, or gets him a berth in a ship bound to it.

§ 1. A seaman who is discharged, after the crew are shipped, without just cause, has a right to pay for two months as compensation, in addition to what he has earned during the time already past.

§ 2. The captain cannot, in any of these cases, make the owners or charterers of the ship repay him the amount of compensation he has had to pay, if the discharge has not been made with their consent.

B. Bk. II., 62, F. 270, G. (1872) 57, 58, H. 344, 437-439, I. 542, R. 310, 312 diff., S. 637, Sc. 89.

535. The seamen have a right to be maintained on board until they are paid their wages, or whatever interest they have under their contract, in full.

§ 1. Moreover, when, after the agreed time of service has expired, (the crew) are obliged to do duty in the ship until she is in a position of safety, has got free *pratique* and discharged her cargo, they are entitled also to be maintained on board, and to the payment of wages for this additional service.

G. (1872) 55, I. 524, 544, H. 446, R. 300, Sc. 84.

536. If, the ship being in quarantine, it is decided to despatch her on another voyage, a seaman who does not wish to agree to go such voyage has a right to be disembarked in the quarantine ground, his necessary expenses and his wages for the whole time he is detained there being at the ship's charge.

I. 544.

537. Wages and other interests of seamen cannot be assigned, arrested, or pledged except for the legal support of the families or for debts of the seamen to the ship.

§ 1. In case of sums legally due for the support of families, the assignment, arrest, or pledge may only extend to one-third of the wages, unless the seaman is permitted to agree otherwise.

F. 231, H. 452, I. 545, R. 269, Sc. 69, 76.

F. W. RAIKES.

IV.—RATTIGAN'S JURISPRUDENCE.*

WE are sincerely rejoiced to find that the excellent work which has been done for the student of Jurisprudence by our valued contributor, the learned Vice-Chancellor of the University of the Punjab, has received such early recognition as is involved in the appearance of this handsome and convenient Second Edition barely three years after the first publication of the work. That it thoroughly deserved such recognition we were ourselves fully persuaded, but we perhaps, from our special position, knew somewhat more of the difficulty which a new author on such a subject has in obtaining a footing where the ground is so fully occupied as is the case at our Universities and Inns of Court, than the author himself is likely to have known when he first undertook his task. Indeed, we do not suppose that he had, at the outset, any idea of entering into competition with established manuals of instruction in use in Europe. His primary aim was no doubt one to be fulfilled nearer his own actual sphere of work among the Law Students of the Universities and Colleges in India. That he has succeeded in this primary object, we cannot doubt : the present edition would itself suffice to prove that. But he has done much more, for he has unquestionably established his footing among the authors of Institutional Treatises on Jurisprudence whose works, whether set forth by authority or not, are, and will be, as a matter of fact, largely and increasingly studied in this country, side by side with other and older Text-books. Without neglecting their

* *The Science of Jurisprudence. Chiefly intended for Indian Students.* By W. H. RATTIGAN, LL.D., Barrister-at-Law, Vice-Chancellor of the University of the Punjab, and an Additional Member of the Council of the Governor-General for making Laws and Regulations. 2nd Ed. Wildy & Sons, 1892.

Austin, their Maine, their Muirhead, their Holland, men will be found reading and marking their Rattigan just as they are found reading and marking their Taswell-Langmead side by side with their Hallam and their Stubbs. And this quite naturally and quite properly. For, while the facts and the principles, whether in Law or in History, must be common to all writers on those subjects, the mode of presenting those facts and of deducing inferences from those principles is the special property of the several individual writers. And it is by a comparison of their several views that the student will best arrive at just conclusions. An American writer may not always be orthodox in his mode of treating his subject, but he is generally fresh, and sometimes original, in his treatment of it.

To touch on some details of Dr. Rattigan's work, we would say that we think that the marginal headings of the chapters want a certain amount of amplification, or rather perhaps of duplication, in order to serve their purpose as sign-posts. Thus, on p. 31, we have in the margin, "Artificial persons," a useful note, as the leading idea of the latter half of that page and of the whole of p. 32, and which is further made clear to us by the sub-heading, "Requisites of." This explanatory sub-heading is easily understood on p. 31; but when we come to p. 32 it is not so easy to grasp the idea to which we are intended to be led up by "Extinction of" in the margin, there being nothing else on the margin of that page to shew us what it is that is extinguished. In such a case, we would suggest the duplication, say in italics or in brackets, of the leading *weg-weiser*, "Artificial persons," on p. 32, so as to make it more clear to the reader, especially in the case of a rapid run over the pages, to what the subordinate *weg-weiser*, "Extinction of," itself refers. We are not sure that it might not also tend to the convenience of the student, in a future edition, to bring out the leading divisions and subdivisions of the Chapters, such as "Sources of Law," by the

use of italics, or some other distinguishing mark, both for, *e.g.*, such broad divisions as "Sources of Law," and for such sub-divisions as "Oblique Legislation," &c.

In the present edition, which has had the advantage of being printed in England, and is therefore free from certain errors of typography almost inseparable from works printed in India, Dr. Rattigan has been enabled to set his views before us in a form and shape at once more elegant and more convenient than in his first issue, and the work will doubtless gain something from that fact alone. He has also been enabled to consult a wider range of sources, whether English, American, or Continental, and to bring them down to date, advantages which his readers will not fail to appreciate. The American writers well deserve this recognition, not simply on account of the Storys and Kents and other great men of old, but also because of the modern School, the men of the present day, many of whom are still living, while even those who have passed away are modern in their spirit, and are kept in touch with us by careful editing. To the Americans we owe much freshness of presentment of old doctrines. It is scarcely too much to say that to read an American work on a branch of the Law which is common to our two countries, after one of the recognised English Text-books on the same subject, is like passing into a new land, so fresh is the treatment which the subject is apt to receive in the United States. This may be illustrated by reference to such a palmary case as that of Holmes on *The Common Law*, but it is no less true of other writers cited by Dr. Rattigan, less known perhaps to the average English practitioner, such as Weeks on *Damnun absque Injuria*, as well as others with whose writings we happen to be acquainted.

The Italian writers again are interesting, partly from the historic persistency of Roman Law in Italy, to such an extent, indeed, that arguments as to the length and

the breadth of the Romulean *Pomærium* are found to be the subject of serious discussion in Italian Courts of Law in connection with questions arising in the modern, Haussmanised capital of the Kingdom of Italy, and partly from the fact that the Legal writers of Italy occupy, on the whole, a position which is not precisely that of either the French or German schools of Juridical Thought. We are glad to see that Dr. Rattigan has paid more attention to the Italian writers in his new edition; but it seems a little curious not to find cited in his list of principal authorities such men as Vico, Romagnosi, Rossi, Mamiani, Carnazza-Amari, Pierantoni, who are all worth consulting for the various portions of the vast field of Jurisprudence of which they treat, and that the more particularly, representing as they do different phases of Italian thought. No doubt, the very vastness of the field of Jurisprudence may well cause a Nineteenth Century writer to shrink with dismay before the portentous list of "Authorities," whose study the friendly critic may benignly recommend. But when a writer like Dr. Rattigan has once taken the initial plunge, a few authorities more or less can hardly make much difference to his labour, since he has probably a certain acquaintance with most of them, which only needs filling out a little for the purposes of his Treatise, to give it a colouring still more different from that of most of its English predecessors.

No doubt there are many speculations, as for instance of such a writer as Vico, which it would be unpractical to reproduce in a work like that now before us, but, on the other hand, there are points where Vico diverged from other speculative Jurists and Philosophers of his day, and on which, therefore, his views might well be taken into account, as marking his individuality among the philosophical Jurists of the seventeenth and eighteenth centuries. Vico's age, in both the centuries to which he

belonged, was an Age of Theories, and, to a certain extent, of Theories run mad. But it cannot be questioned that, unworkable as many of the Seventeenth and Eighteenth Century Theories were, they had an immense influence on the actions of the men of Vico's age, and the influence was as powerful as it was, frequently at least, unsuspected. There are few features of the Eighteenth Century more striking, and in some respects more touching, than the craving, almost amounting to a craze, for the simplicity of a dream-built State of Nature in the midst of a Society highly artificial and rotten to the core. And one of the most striking features of this craving is the fact that, so far from being confined to one party in the sharply-divided Political camps of that age, it is found to be practically universal. It is borne witness to, however imperfectly, and however unknowingly, by the feigned rusticity of which a Watteau or a Greuze give us so many lively presentments, and of which the diaries and memoirs of persons acquainted with both the French and English Courts of the declining years of the Eighteenth Century give us equally striking word-pictures, no less than by the *Contrat Social* of a Rousseau, or the writings of the Encyclopédistes. There were writings on the other side, also, which seem to be practically unknown in this country, though their memory survives on the Continent. Such was the *Discours sur l'Homme considéré relativement à l'état de Nature et à l'état de Société*, of Sigismond Gerdil, a distinguished wearer of the Roman Purple, which was written by way of an answer to Rousseau's *Contrat Social*, and of which Father Tondini de Quarenghi says, in the current number of the *Revue Générale*, of Brussels, that it may be read with profit even in these our days. Gerdil was also author of a *Précis d'un cours d'instruction sur l'origine, les droits et les devoirs de l'autorité souveraine*, published in Rome in 1807, and which was republished at Naples in 1854. In this Treatise,

speaking of that inequality of the distribution of wealth among the various portions of Human Society which is now, as in the Cardinal's own day, attracting so much attention, and exciting so much discontent, Gerdil writes as follows:—"It is natural, just, and advantageous to Society that there should be inequalities of wealth and fortune in the State, but this inequality must have limits; all excess is blameable. If a relatively small number of citizens were to become possessed in their sole persons of the greater portion of the land (*domaines*), the people as a body would be poor. There would be excess of riches on the one side, excess of misery on the other. The luxury of the rich and the poverty of the people would create a contrast which would be humiliating for the human race." The picture thus drawn by the Cardinal is remarkably true of the present times, and it can scarcely be doubted that this fact is at the bottom of much of the internal upheaving of the masses which makes itself felt on the surface by attempts to blow up Law Courts with dynamite even in Republican France.

The spirit which has been aroused in the present day by the contemplation of that unequal partition of wealth which the Eighteenth Century member of the Roman Curia denounced by anticipation as humiliating to the human race, is a spirit as distinctly antagonistic to Law as it is to any existing form of Government, whatever be its name. Republics, it is seen, fare no better than Absolute Monarchies at the hands of those who are permeated with this Nihilistic spirit. It seems all the more desirable, therefore, that the bases of the constitution of Law and of Society should be well brought to the front in Treatises on Jurisprudence published in such days of unrest, and that it should be made evident, to those at least who will take the trouble to read and to think, that without Law there can be no Order and no Society. What particular form of Government

should be adopted in any given country is immaterial to the Jurist. What is material to the stability of Society, is that the members of the community should understand that Dynamite is a solvent, not a constituent of Society, and that the Great Nothing can never take the place of any existing Government, because Government of some kind there must be in any form of the state of Society. And while it is no doubt urgent that all real abuses should be reformed, the existence of a Government, whatever its name, is not an abuse, but a necessity for the continued existence of man in the Social State.

We should be glad to see Dr. Rattigan devote more space in his next edition to the fuller consideration of the Political and International branches of the Science of Jurisprudence, which appear to us to be of such great importance at the present day, for it is as true now as in the days of Aristotle that, in the sense of the Greek Jurists, man is not only a Social but also a Political being. He must therefore have his Society as he must have his Polity. Without these, indeed, he would be but a rude, inchoate being, a sort of Caliban, that is to say, something less than man.

V.—CURRENT NOTES ON INTERNATIONAL LAW.

The Behring Sea Arbitration.

THE text of the Treaty referring this controversy to arbitration has now been published.* It was signed at Washington on 29th February, 1892, by Sir Julian Pauncefote and Mr. Blaine. The arbitrators are to be seven in number, of these, our Queen and the President of the United States are each to appoint two, and the

* See Parliamentary Papers. U.S., No. 2 (1892), and Treaty Series, No. 8 (1892).

President of the French Republic, the King of Italy, and the King of Sweden and Norway one each. The Tribunal is to meet in Paris after the delivery of the counter-cases, provided for by Article 4. There are five points to be submitted to the arbitrators, and the decision of the majority upon such points is to be a "full, perfect, and final settlement." The following are the points in question:—

1. What exclusive jurisdiction in the sea now known as the "Behring's Sea," and what exclusive rights in the Seal Fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

2. How far were these claims of jurisdiction as to the Seal Fisheries recognised and conceded by Great Britain?

3. Was the body of water now known as the Behring Sea included in the phrase "Pacific Ocean," as used in the Treaty of 1825 between Great Britain and Russia; and what rights, if any, in the "Behring's Sea," were held and exclusively exercised by Russia after the said Treaty?

4. Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in "Behring's Sea," east of the water boundary, in the Treaty between the United States and Russia of the 30th March, 1867, pass unimpaired to the United States under that Treaty?

5. Has the United States any right, and, if so, what right, of protection or property in the fur seals frequenting the islands of the United States in "Behring Sea," when such seals are found outside the ordinary three-mile limit?

On April 18th a supplementary Convention between the two countries was signed, by which the two Governments undertake to prohibit seal killing in the waters in question during the pendency of the arbitration, subject to certain exceptions, which are duly provided for according to the result of the arbitration.

The arbitrators nominated by our own Government will give general satisfaction. No more suitable persons could have been selected than Lord Hannen and Sir John Thompson, the Canadian Minister of Justice. The appointment of the Canadian Minister of Marine, Mr. C. H. Tupper, as British agent, to attend the Tribunal of Arbitrators, is also a good one.

[*Note*.—The varying *formulae* for the Behring Sea here placed within marks of quotation are taken from the Parliamentary Papers embodying the Text of the Convention. It appears to us that there is an unnecessary inconsistency in these *formulae*, and that Question 4 is put in a form scarcely suited to an Arbitration.—ED.]

* * *

Private International Law.

Domicile.

The facts in the case of *Goulder v. Goulder*, L.R. [1892] P. 240, are not very remarkable, but the decision is noteworthy for the *dictum* of Lopes, L.J., at p. 243 of the report, where he says: "The English Divorce Court has jurisdiction to dissolve the marriage of any parties domiciled in England at the commencement of such proceedings, and this independently of the residence of the parties, the allegiance of the parties, the domicile of the parties at the time of the marriage, the place of the marriage, or the place where the matrimonial offence or offences have been committed."

* * *

Gift by Will to Illegitimate Child.

A very good illustration of the rules as to legitimation *per subsequens matrimonium* was afforded by the recent case of *In re Grey v. Earl of Stamford*, W.R., 1892, p. 93. The case (which, it is to be hoped, will be reported more fully later on) was one in which a domiciled English testator

gave a share of realty and a share of personalty in trust for his son, Harry Grey, for life, with remainder in trust for "all his children in equal shares." Harry Grey, in 1856, went to the Cape, where he became domiciled and had one son born before marriage, and other children born in wedlock. By Cape Law (*i.e.*, Roman-Dutch Law), the first son was legitimated by the subsequent marriage of his father and mother. It was held by Stirling, J., following *In re Andros*, 24 Ch. D. 637, and *In re Goodman's Trusts*, 17 Ch. D. 266, etc., that the first son was entitled to a share both of the personalty and realty, the rule in *Doe v. Vardill*, 7 Cl. & F. 895, only applying to descents upon intestacy, and not affecting a case of devise to children by will.

* * *

Jurisdiction in Respect of Foreign Land.

The peculiar application of the principle that "Equity acts *in personam*," exemplified in cases like *Paget v. Ede*, 18 Eq. 118, *Cranstown v. Johnston*, 3 Ves., 170, &c., has been well illustrated in the case of *Mercantile Investment Co. v. River Plate Trust*, L.R. [1892] 2 Ch. 303, in which North, J., held that a domiciled English company, having foreign land vested in them subject to an express obligation to pay off a charge thereon out of the proceeds of sale of the land, was accountable to the holders of such charge for such proceeds, and that the English Courts had, under such circumstances, jurisdiction to grant a receiver (though such an appointment was refused in the case in question). In this connection, the principle laid down by Lord Hardwicke in the case of *Cranstown v. Johnston* will be recollected: "With regard to any contract made, or equity between persons in this country, respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction as if they were situated in England." (3 Ves., p. 182.)

Extradition.

A point of some importance in connection with the Extradition Treaty, 1890, with the United States, arose a short time ago in the case of *Reg. v. Ashforth*, Sol. Journal, 1892, p. 234, in which the Divisional Court held that, in accordance with Article 8 of the Treaty, the English Courts would not extradite a prisoner where the evidence was not clear as to the alleged crimes (which were new extradition offences) having been committed subsequent to the date at which the Treaty came into force.

* * *

Procedure, &c.

The decision of the Court of Appeal in *Rein v. Stein*, L.R. [1892] 1 Q.B. 753, as to the meaning of Order 11, rule 1, as to actions "founded upon a breach within the jurisdiction of a contract, which, according to the terms thereof, ought to be performed within the jurisdiction," clearly endorsed the view taken by the Court in the earlier cases of *Robey v. Snaefell Mining Co.*, 20 Q.B.D. 152, and *Bell & Co. v. Antwerp, London & Brazil Line*, L.R. [1891] 1 Q.B. 103. The principle laid down in *McHenry v. Lewis*, 22 Ch. D. 397, &c., that where an action is pending in this country, concurrent proceedings abroad will be stayed "if a person can only obtain an illusory advantage from them," was sustained by the Probate Court in *Armstrong v. Armstrong*, L.R. [1892] P. 98, in a suit for dissolution of marriage.

J. M. GOVER.

Quarterly Notes.

The House of Lords and the Grammar of our Statute Book: The Shop Hours Act, 1892.

We believe there are some "advanced" persons who suppose that members of the Upper House sit serenely in golden clouds, absorbed in the contemplation of their own dignity, and, like the Olympic deities according to Horace, unheeding of the affairs of the common herd below. Such will not be the opinion of those who study the history of the Bill which has now become the Shop Hours Act, 1892. When this Bill went up to the Lords it contained a clause under which an employer charged with an offence, but conscious of his own innocence, might have the actual offender brought before the Court "upon information duly laid before him," and so escape the penalty. Imagine an employer, or anyone else, duly laying an information before himself! In a later clause there was a provision for appointment of Inspectors, to whom sects. 68, 69, and 70 of the Factory and Workshop Act, 1878, were to apply. But one of these sections, 69, was repealed by 54 & 55 Vict., c. 75, s. 39, so that the clause purported to apply a non-existent enactment. The same clause was so drawn that, for want of a few qualifying words, it applied the powers of the new Inspectors distinctly to factories and workshops, and not to shops as intended. The amendments of the Lords dealt promptly and simply with these errors, substituting "by" for "before," striking out "69," and inserting the necessary qualifying words; happily the amendments were accepted by the Commons. The serious questions remain, how was it that a Bill, and, in the present instance, a very short Bill, could be brought in although it

contained three such palpable blunders at the time of its introduction, and how was it that it passed through all the stages in the Lower House — including the supposed searching scrutiny of a Select Committee—without these errors being discovered? It may, perhaps, be conjectured that the “able draughtsman” thought it unnecessary to revise his work carefully because “honourable and learned members” would be sure to correct anything that was wrong, while on their side “honourable and learned members” thought it superfluous to examine the details, because they were sure to have been properly attended to by the “able draughtsman”! As events have actually turned out, it seems decidedly matter for congratulation that there was still a House of Lords to intervene, and to make the proposed Legislation at once grammatical and workable.

* * *

**The International Congress of Orientalists, Lisbon, and the
Conference of the Association for Reform and Codification
of the Law of Nations, Genoa.**

We are glad to find by the latest accounts, which reach us as we are passing through press, that the prospects of both the Congresses to which we have already drawn the attention of our readers are most promising for Sessions of real work.

At Lisbon, where the Orientalist Congress opens 23rd September, there will, as far as is at present known, be representatives of some forty-five learned bodies from France, including the School for living Oriental Languages, whose Director will represent the Ministry of Public Instruction at the Congress. Much new information will be afforded concerning the relations of Portugal alike with the East and with Africa from literary sources hitherto unknown, at any rate outside the Portuguese Departments or Bodies

which had charge of the documents in which this information is contained.

At Genoa, by invitation of the Syndic and Municipality, the Fifteenth Conference of the Association for the Reform and Codification of the Law of Nations will hold what promises to be an interesting and useful Session, 5th—11th October. Among the subjects to be treated we may mention, under Public Law, International Arbitration, the Progress of which will be described by W. E. Darby, LL.D., Secretary of the Peace Society; Arbitration or Mediation, by F. J. Tomkins, D.C.L., of Lincoln's Inn; Africa and the Law of Nations, by C. H. E. Carmichael, M.A., of the Inner Temple, who will also bring before the Maritime Law Section the question of International Agreement as to Tonnage, which attracted the attention of the Vienna Meeting of the International Statistical Congress. Among Italian Jurists who are to take part in the Conference may be named Professor Gabba, of Pisa, on the Conflict of Marriage Laws; Professor De Rossi, of Leghorn, on the Execution of Foreign Judgments; the Advocates Baisini and Villapernice, of Milan, on *Lettres Rogatoires* and on the Reciprocal recognition of Notarial Acts, while in Maritime Law, Dr. Rahusen, of Amsterdam, and Mr. McArthur, President of the Liverpool Chamber of Commerce, are in charge of important questions connected with the York-Antwerp Rules, 1890, which it is to be proposed shall alone henceforth be the form of those Rules recognised by the Association. Spain will be represented at Genoa by one of the Foundation Members of the Association, the Senator Don Arturo de Marcoartu, who will read a Paper on the Neutralisation of Commercial Highways.

Reviews.

Legal Handbooks. Edited by ALMARIC RUMSEY. *Executors and Administrators.* By ALMARIC RUMSEY, Barrister-at-Law, Professor of Indian Jurisprudence, King's College, London. Swan Sonnenschein & Co. 1891.

This Handbook, being the initial volume of the Series under the Editorship of our valued contributor, should strictly speaking have been the first to be noticed in our pages. But the extreme nearness of such an event as the General Election, through which we have been passing since our May number came out, seemed to us, where space and other considerations forbade more than one receiving notice in the same number, to call for precedence in favour of Mr. Ellis. We trust that we shall not thereby have incurred the reservation *in petto* of vials of wrath to be poured on us at the first convenient season by the Editor of the Series.

Professor Rumsey is already so well known to our readers, as well as to the Legal public generally, by his various manuals in connection with the subject of his present book, that the ground is well prepared for a favourable reception of the volume before us.

The book shews us, in its references to cases, what we have ere now had occasion to remark, that the names of parties are often seriously mis-stated in the Reports. Thus, at p. 31, we find a reference to *Duke of Devon v. Atkins*, 2 P. Will. 381, whereas it is certain that the title of Duke created in the Cavendish family was Devonshire not Devon, and therefore, in Law, there was and is no "Duke of Devon" who could have been a party to any cause. This is really not a small matter, as a good deal might at any moment hinge on the description of parties in a cause, and to this day we notice names which have no existence substituted for the true names in some of the various Reports.

The Mohammedan lore of the learned Professor of Indian Jurisprudence occasionally makes itself felt, as e.g., on p. 17, where the note on preference of debts by an executor says, "The injustice of arbitrary preference is avoided by the

Mahommedan law, under which debts abate in proportion like legacies," and refers to the author's *Al Sirajiyah reprinted*, 2nd Ed., p. 36, and *ib.* App. L., and continues, "This is one of the many points in which we might well take a lesson from the Mahommedan law as to the property of deceased persons." On p. 30 we notice a slight misprint in Note 1, in the reference for *Mullins v. Smith*, to "1 Dr. v. Sm. 204, 210," which should obviously read Dr. and Sm. 204, 210, as correctly given on p. 34. On p. 307 we have an interesting reference to a decision (*Hamnet v. Kerry*, 1884), not reported, but for which the learned author can vouch as having been of counsel in the cause.

The loose drafting of our Legislators receives due notice from time to time, as when the Middlesex Registry Table of Fees for Registration is cited, p. 107, as being "1s. for 200 words or less, 6d. for every 100 beyond that," and a note is appended, "Probably it is meant that 6d. shall be paid also for any fractional part of 100, but this is not expressly stated." It would not have been difficult to insert in the official schedule the words "or fractional part thereof" after "100," and we have no doubt that such is the construction which the officials of the Middlesex Registry would enforce as the true and only construction, from their point of view, whatever might be argued as a matter of grammar. Again, on p. 109, we find that under the Yorkshire Registry the words "East Riding" are held to include "the town or county of Kingston-upon-Hull," by which Mr. Rumsey suggests in his note 4, is "probably meant the *town and county of the town* of Kingston-upon-Hull." No doubt this latter is the correct amplification of the inaccurate abridged form officially employed. But the question may well arise in our minds, why should officials so frequently be loose and inaccurate in their language, whether in drafting Bills or preparing Forms and Schedules? Great is the mystery of official drafting, though Lord Thring, at least, in our day, has done much to point out to the draftsman the necessity of clearness no less than of conciseness and grammatical accuracy in our Legislation.

Le Droit de Visite, la Traite, et la Conférence Anti-esclavagiste de Bruxelles. Par THOMAS BARCLAY, Avocat à la Cour de Londres. (Reprint from *Revue de Droit International*, Brussels, 1891.)

In this Pamphlet, printed from the pages of our esteemed contemporary, the *Revue de Droit International*, of Brussels, the

organ of the Institut de Droit International, to whose proceedings we frequently draw the attention of our readers, one of our own valued contributors, Mr. Thomas Barclay, deals with a subject which is likely, in some shape or other, to come up for discussion at the forthcoming Conference of the Association for the Reform and Codification of the Law of Nations at Genoa.

The difficulties connected with the subject of Mr. Barclay's essay are partly Philological, partly those which are inseparable, apparently, from the *amour propre* of States. There is the point for Philologists to discuss, what is the proper French equivalent of "visit and search," and does *Droit de Visite* imply search or not? As a matter of fact, the question really at issue is the verification of nationality. It is conceded on all hands that the mere hoisting of the flag of a particular country is not in itself evidence in Law that the vessel hoisting such colours is entitled to sail under them. How can this, which is a question of fact as well as of Law, be verified without visitation and search, that is to say, boarding the vessel and examining her Papers? Klüber, in his *Droit des Gens Moderne* (ed. by Ott, Paris, 2nd Ed., 1874), § 294, says that when a merchant ship is sailing without convoy [which, we may remark, is now the usual case] verification [of nationality] is made by the Production and Examination of the Ship's Papers (*Papiers de mer, livres de bord, Seebriefe*). This seems an inquisition impossible to effect by mere signalling or enquiries by means of the speaking-trumpet, and is, therefore, clearly (whatever it may be called) the right contended for on the part of Great Britain in connection with the requirements for the suppression of the Slave Trade. Yet Klüber in a later portion of the same Section speaks of the *visite* as taking place subsequently to all the above described investigations, if their result leaves suspicions. It seems obvious that we have here, as Mr. Barclay contends, to deal with a logomachy. Klüber's editor, M. Ott, says, in a note to the Section cited, that "Modern Authors" distinguish between the *droit de visite proprement dit*, viz., the ascertainment (*constatation*) of a ship's nationality by inspection of her Papers, and the *droit de recherches ou de perquisition*, by which belligerent cruisers or corsairs often attempt to supplement the evidence of his ship's Papers. The question of the possible action of corsairs (*corsaires*) scarcely seems one with which we need be concerned

in a matter of the disputed interpretation of a recognised portion of the terminology of the Law of Nations.

In fact, visitation and search are synonymous, and the two epithets are used together by some English writers, as, *e.g.*, Hosack, *Rise and Growth of the Law of Nations*, Lond., 1882, p. 168, where the learned author says, incidentally, that the right of visitation and search was an acknowledged incident of naval warfare in the early part of the sixteenth century, and adduces evidence from Rymer's *Fœdera*, XIV., 329. It were much to be desired that the Powers interested in the suppression of the Slave Trade should come to a definite agreement on the words to be employed, and the meaning to be attached to the words expressing the English phrase visitation and search.

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Quarterly Digest

OF

ALL REPORTED CASES,

IN THE

Law Reports, Law Journal Reports, Law Times
Reports, and Weekly Reporter,

FOR AUGUST, SEPTEMBER, AND OCTOBER, 1891.

By C. H. LOMAX, M.A., of the Inner Temple,
Barrister-at-Law.

Administration:—

- (i.) **P. D.**—*Grant of.*—Where the husband of an intestate had been cited to take out letters of administration and had entered no appearance, the Court passed him over and made a grant to the only son of the intestate.—*In the goods of Moore*, L.R. [1891] P. 299.
- (ii.) **C. A.**—*Property Charged with Legacy—Power to Mortgage—Priority.*—A testator, who died in 1866, appointed his two sons, his partners, trustees and executors of his will. He charged all his estate with a legacy of £5,000, which he empowered his trustees to retain in their business as long as they might reasonably require or wish. He gave his residue to the sons, and declared that if they should sell or charge any part of the estate for a "full or valuable consideration" it should not be liable, in the hands of the purchaser, to the legacy. The partnership was possessed of freehold buildings subject to a mortgage. In 1878 the sons mortgaged these premises to R. to secure past and future advances. No fresh advance was made at the time. Out of past advances the sons had (without any stipulation to that effect by R.) paid off the mortgage and had taken a reconveyance to themselves. *Held*, that the mortgage to R. was a charge for a valuable consideration within the terms of the will; that the sons were sole judges of the length of time during which it was reasonable to keep the £5,000 in the business; and that in the absence of *mala fides* the mortgage to R. had priority for the whole amount due on it over the charge for the £5,000.—*Redman v. Rymer*, 65 L.T. 270.
- (iii.) **Ch. D.**—*Scotch Will—English Land—Mortmain—Annuities.*—A domiciled Scotchman, by a Scotch will, gave all his estate to trustees on trust to pay debts, legacies and annuities, and in the events which happened, gave the residue to charities. He desired that his estate should be administered as far as possible according to Scotch law. He

left personal estate sufficient to pay the debts, legacies, and annuities, and real estate both in England and Scotland. The heir-at-law claimed—(1) that the charitable gifts, so far as payable out of English real estate, were void; (2) that the English real estate ought not to contribute to the payment of the debts, legacies, and annuities. It appeared that by Scotch law the annuities were payable primarily out of realty, and that the Scotch Courts, in administering the estate of a Scotch testator, would deal with his real estate wherever situated according to Scotch law, except so far as it was proved that such dealing was contrary to the *lex loci*. *Held*, that the charitable gifts were void so far as payable out of English real estate; but that though the annuities were by English law payable primarily out of personalty, yet as that law did not prohibit their being charged on real estate, and the testator had directed that his estate should be administered according to Scotch law, the English real estate must contribute, rateably with that in Scotland, to the payment of the annuities.—*Lawson v. Duncan*, 65 L.T. 48.

- (i.) **Ch. D.—Specific and Residuary Gifts—Debts owing by Legatees—Limitations—Set-off.**—A testator made certain specific devises and bequests to his sons, and gave, devised, and bequeathed his residuary real, and personal estate on trust for sale, the proceeds to be divided among the sons in specified proportions. He had advanced various sums of money to his sons, and had taken acknowledgments or promissory notes from them. The right of action in respect of such debts was barred by the Statute of Limitations. *Held*, that the executors were not entitled to set off the advances against the property specifically devised or bequeathed to the sons; but that the sons must bring such advances, with interest at the rate of 4 per cent. from the death of the testator, into account as against their respective shares of the residuary estate.—*Akerman v. Akerman*, 65 L.T. 194.

Adulteration:—

- (ii.) **Q. B. D.—Sale of Food and Drugs Act, 1875, s. 6—Article sold inclosed in Wrong Wrapper—Evidence—Admissibility.**—W., a person employed by the respondent, on his instructions went into the appellant's shop and asked for some lard. He was served by the shop assistant, and handed the article to the respondent, who informed the assistant that it was bought for the purposes of analysis. The assistant then noticed that he had by mistake inclosed the lard in a wrapper labelled "margarine" instead of "lard compound." The justices convicted the appellant, rejecting evidence of such mistake. *Held*, that the evidence was admissible and material, and that the conviction must be quashed.—*Kearley v. Tylor*, 65 L.T. 261.

Annuity:—

- (iii.) **Ch. D.—Perpetual—Payment of Cash Value—Rate of Interest—National Debt (Supplemental) Act, 1888, s. 1.**—Persons to whom a perpetual annuity had been bequeathed were desirous of receiving the amount of the annuity in cash. *Held*, that the amount to be paid was the sum which at the price of the day would purchase £2 10s. per cent. stock sufficient to produce the annuity, and that as no actual purchase of stock would be made, no charge for brokerage ought to be included in calculating the price of the stock.—*Hicks v. Ross*, 65 L.T. 200.

Arbitration:—

- (iv.) **Q. B. D.—Application to Stay Proceedings—"Steps in Proceedings"—Arbitration Act, 1889, s. 4.**—The plaintiff sued for work done under a

contract which provided that all disputes should be referred to arbitration. Defence and counter-claim were delivered, but no reply. The plaintiff took out a summons for particulars of the counter-claim, which was amended by the defendant. The plaintiff obtained leave to deliver interrogatories, and afterwards discontinued his action. He then took out a summons to have the matter referred, and for a stay of proceedings under the counter-claim. *Held*, that he had taken such "steps in the proceedings" as prevented the Court from granting such stay.—*Chappell v. North*, L.R. [1891] 2 Q.B. 252; 60 L.J. Q.B. 554; 65 L.T. 23.

- (i.) **Q. B. D.**—"*Submission*"—*Agreement in Writing—Bought and Sold Notes—Difference in Terms—Arbitration Act, 1889, s. 27.*—Goods were sold by the plaintiffs to the defendants through brokers. The defendants sent to the brokers a bought note containing the clause: "Any dispute arising on this contract to be settled by arbitration." There was no such clause in the sold note sent by the brokers to the plaintiffs. *Held*, that there was no "submission," as there was no agreement in writing between the parties to refer matters in dispute to arbitration.—*Caerleon Tin Plate Co. v. Hughes*, 65 L.T. 118.

See Friendly Society, p. 12, vi.

Bailment :—

- (ii.) **Q. B. D.**—*Liability of Bailees—Negligence of his Servant.*—The defendant hired a carriage and horse from the plaintiffs. The defendant's servant, instead of taking them, as was his duty, to his master's stable, drove in another direction for his own purposes. While he was so doing the carriage and horse were injured, owing to his negligence. *Held*, that there had been a breach of the defendant's contract as bailee for which he was liable.—*The Coupé Co. v. Maddick*, L.R. [1891] 2 Q.B. 413.

Banker :—

- (iii.) **Q. B. D.**—*Negotiable Securities—Deposit by Broker—Bond fide Holder for Value.*—The plaintiff gave to B., a broker, certain bonds to be exchanged for certificates. The bonds, by the custom of the Stock Exchange, passed by delivery without transfer. B. deposited the bonds with the defendants, his bankers, in exchange for certain other securities which they held as security for his overdrawn account. The defendants knew that B. was a broker, but did not know that the bonds were not his own. *Held*, that the defendants were entitled to hold the bonds as against the plaintiff, as the securities were negotiable instruments, and the defendants were *bond fide* holders for value; and that the mere fact that they knew that B. was a broker did not cast on them the duty of enquiry, or affect them with notice that the securities did not belong to B.—*Baker v. Nottingham and Nottinghamshire Banking Co.*, 60 L.J. Q.B. 542.

Bankruptcy :—

- (iv.) **Q. B. D.**—*Act of—Failure to Comply with Notice—Bankruptcy Act, 1883, s. 4, (g), sub-s. 1*—The act of bankruptcy arising out of a failure to comply with the requirements of a bankruptcy notice, is not put an end to by the subsequent payment of the debt out of which it arose, but such act of bankruptcy remains in existence, and may be made use of by any creditor within the prescribed period for the purpose of presenting a petition founded on that act of bankruptcy.—*E. p. Powell*; *in re Powell*, L.R. [1891] 2 Q.B. 324; 64 L.T. 800; 39 W.R. 656.

- (i.) **Q. B. D.—Act of Bankruptcy—Time—Computation of—Bankruptcy Act, 1883, ss. 4, 141.**—On December 4th, T. presented a petition against a debtor, alleging non-compliance with a bankruptcy notice served on November 20th. On January 2nd the debtor paid £100 to T., and the petition was dismissed. *Held*, that the act of bankruptcy was complete on November 27th, and therefore was not within three months of a second petition presented on February 28th, and that, therefore, the payment to T. was good and could not be set aside by the trustee appointed under the second petition.—*E. p. Townsend; in re Maud*, 64 L.T. 743.
- (ii.) **Q. B. D.—Appeal—Security—Deposit Dispensed With—Bankruptcy Rules, 1886, r. 131.**—A creditor in receipt of 30s. weekly wages, recovered judgment in the County Court for £50 for injuries received from A., a fellow labourer. A. became a bankrupt, and the creditor applied to the County Court to order the bankrupt to set aside a portion of his weekly wages to meet the judgment debt. The County Court refused the application, and the creditor applied that the deposit of £20 required to be lodged before appealing might be dispensed with. *Held*, that under the circumstances the deposit must be dispensed with, and the time for appealing extended.—*E. p. Lloyd; in re Jones*, 64 L.T. 803.
- (iii.) **Q. B. D.—Appropriation of Salary or Income—Collier's Wages—Bankruptcy Act, 1883, s. 53.**—The wages of a working collier are not "salary" or "income," and therefore the Court cannot order any portion of such wages to be set aside for the benefit of the creditors of the collier, who was an undischarged bankrupt.—*E. p. Lloyd; in re Jones*, L.R. [1891] 2 Q.B. 231; 64 L.T. 804.
- (iv.) **Q. B. D.—Disclaimer of Leaseholds—Costs—Taxation—Bankruptcy Rules, 1886, r. 112, sub-s. 2.**—The costs of a trustee's application to disclaim leaseholds are costs of a "proceeding under the Act," which, as a general rule, are payable out of the estate. Where, therefore, the assets are under £300, such costs are taxable on the lower scale.—*In re Procter*, L.R. [1891] 2 Q.B. 433; 39 W.R. 655.
- (v.) **Q. B. D.—Examination of Witness by Creditor—Object of Creditor—Bankruptcy Act, 1883, s. 27.**—The Court may summon a witness for examination as to the dealings or property of a debtor on the application of a creditor, but this power is not to be used for the purpose of enabling the creditor to obtain materials to assist him in a private action which he has pending against the witness whom he seeks to have examined.—*E. p. Davis; in re Easton*, 64 L.T. 798.
- (vi.) **Q. B. D.—Notice—Debt—Judgment for Taxed Costs—Final Judgment.**—Judgment had been given in an action in favour of the defendant, and the judgment had been drawn up in the ordinary form, with a blank left for the amount of costs. The costs were taxed, and a certificate given for the amount, but the blank in the judgment was not filled up. A bankruptcy notice was issued for the amount of the taxed costs, on which a petition was presented, and a receiving order made against the debtor. *Held*, that as no execution could issue upon the judgment as it stood, nor upon the certificate alone, there was no final judgment, and that the receiving order must be set aside.—*E. p. Crump; in re Crump*, 64 L.T. 799.
- (vii.) **Q. B. D.—Petition by Public Officer of Company—Bankruptcy Rules, 1896, r. 258—Amendment—Bankruptcy Act, 1883, s. 143.**—The Court will amend formal defects in a bankruptcy petition more readily than in the case of a notice, as in the former case the preliminary steps have been complied with, and the formal notice is complete. Rule 258,

which, in the case of a petition presented by a public officer of a company, requires proof of his authority to present the petition, only applies to unincorporated companies.—*E. p. Dan Rylands*; in *re R. Collier*, 64 L.T. 742.

- (i.) **Q. B. D.**—*Protected Transaction—Notice of Petition—Sheriff—Bankruptcy Act*, 1883, s. 168—*Bankruptcy Act*, 1890, s. 11, sub-s. 2.—A man who seizes, keeps possession of, and sells the goods of a judgment debtor by the order of the sheriff, is not an "officer charged with the execution of a writ or other process," and therefore is not a "sheriff," and notice to him within fourteen days after sale of a bankruptcy petition presented by or against the debtor, is not notice to the sheriff so as to entitle the official receiver or trustee in bankruptcy to the balance of the proceeds of sale.—*Bellyse v. M'Ginn*, L.R. [1891] 2 Q.B. 227.
See *International Law*, p. 15, i. Landlord and Tenant, p. 16, i.

Bill of Sale:—

- (ii.) **Ch. D.**—*Pledge of Chattels—Delivery to Pledges—Delivery Order*.—The plaintiff, on borrowing money from the defendants, gave them promissory notes for the amount of the loan and interest, and verbally agreed to give the defendants possession of some goods deposited in the warehouse of T., as security for the loan. He gave the defendants a delivery order for the goods. *Held*, that the delivery order was the means of changing possession only, or at most a record of a completed transaction, and was not essential to the title of the defendants to the goods, which was completed by the verbal agreement, and that it was not a bill of sale and did not require registration as such.—*Grigg v. National Guardian Assurance Co.*, 64 L.T. 787; 39 W.R. 684.
- (iii.) **C. A.**—*True Owner—Statement of Consideration—Undisclosed Trust—Bills of Sale Acts*, 1878, ss. 8, 10, sub-s. 3; 1882, s. 5.—The grantor of a bill of sale of chattels by way of security is still the true owner of the chattels, and may execute a subsequent valid bill of sale of the same chattels. X., who owed a sum of money partly secured by an existing bill of sale, executed a second bill of sale of the same chattels for a fresh advance, on the understanding that he should pay off the existing debt out of the sum advanced. The bill of sale was expressed to be made in consideration of the fresh advance, and there was no mention of the intended application of the money. The money was paid to X. and applied by him as agreed. *Held*, that the consideration was truly stated, and that there was no undisclosed trust.—*Thomas v. Searles*, L.R. [1891] 2 Q.B. 408; 65 L.T. 39; 39 W.R. 692.

Breach of Promise of Marriage:—

- (iv.) **C. A.**—*Corroboration of Promise—82 & 83 Vict., c. 68, s. 2*.—In an action for breach of promise of marriage, the mere fact that the defendant had not answered certain letters written to him by the plaintiff, in which she asserted that he had promised to marry her, is no corroboration of the plaintiff's testimony in support of such promise.—*Wiedemann v. Walpole*, L.R. [1891] 2 Q.B. 534.

Bread:—

- (v.) **Q. B. D.**—*Sale of otherwise than by Weight—6 & 7 Will. IV., c. 37, ss. 4, 7*.—A customer was served with a loaf by the appellant's son from a cart belonging to the appellant of which the son was in charge. The loaf was not weighed at the time of sale, nor did the purchaser require it to be weighed. The appellant was convicted of selling bread

otherwise than by weight. *Held*, that the conviction was right, and that the Weights and Measures Act, 1889, sect. 32, only relates to the refusal of a baker to weigh bread purchased from him.—*Copeland v. Walker*, 65 L.T. 262.

Building Society:—

- (i.) **Q. B. D.**—*Borrowing—Excess of Powers—Secretary—Agent—Liability of Directors.*—The directors of a building society allowed the secretary to issue advertisements inviting the public to lend money to the society. The money lent was paid to the secretary, who gave an acknowledgment of the payment, and formal receipts were signed by the directors. The secretary made the society's books to shew the loans to be of smaller amounts than those actually received, and appropriated the difference. He afterwards absconded, and it was then found that the society had borrowed a sum in excess of the amount allowed by the rules. *Held*, that the directors were personally liable for the amount advanced to the society in excess of its borrowing powers, as they were cognisant of the course of business pursued by the secretary, and held him out to the public as their agent, although they were ignorant of his frauds.—*Cross v. Fisher*, 65 L.T. 114.
- (ii.) **Ch. D.**—*Winding-up—Contributories—Liability of Advanced Members—Companies Act, 1862, s. 200.*—Under the rules of a building society the advanced members were not made liable to contribute to losses, but the directors were at liberty to allow an advanced member, upon discharging any mortgage, a fair proportion of the profits of the society, in respect of his advanced shares. The society was wound up, and D., an advanced member, was indebted to the society in respect of an advance, which was secured by a mortgage. The mortgage was given to secure payment of "all share or subscription money, expenses, fines, forfeitures, and moneys whatsoever to be paid by the mortgagor pursuant to the rules of the said society in respect of the shares so received by him in advance as aforesaid, or otherwise in respect of his being a member of the said society." *Held*, that an advanced member was the debtor of the society in respect of the moneys which he was bound to pay back, and was not a shareholder liable as a contributory.—*In re Britannia Permanent Benefit Building Society*, 65 L.T. 196.

Colonial Law:—

- (iii.) **P. C.**—*Nova Scotia—Will—Reviving.*—By the law of Nova Scotia, no will or codicil can be "revived" otherwise than by a duly executed codicil shewing an intention to revive the same. By a will, made in 1880, a testator appointed T. his executor, and made a certain residuary bequest. By a codicil, made in 1882, he appointed M. as executor in the place of T. and revoked the residuary bequest. By a second codicil, also made in 1882, and expressed to be a codicil to the will of 1880, he "confirmed" that will in every particular except as altered by that codicil. In the latter codicil, he referred to the appointment of T. as executor, and appointed M. in his place. *Held*, that there was evidence that the testator intended to deal with the will of 1880 as distinct from, and not in combination with, the first codicil, and that the residuary bequest was revived.—*McLeod v. McNab*, 65 L.T. 267.
- (iv.) **P. C.**—*Probate—Duty—Specialty Debt—Bona Notabilia.*—A testator, resident and domiciled in the colony of V., died possessed of estate liable to probate duty in the colony of N. He had sold real property in N., part of the purchase-money being left owing on promissory notes falling due on various dates. A mortgage was executed to secure payment of the notes, which contained an express covenant to pay them, and a proviso

that "no simple contract shall be considered as having merged in the speciality created by or contained in these presents." Some of the notes were not yet due at the time of the testator's death. The testator kept the deed in V. and the notes were kept at a bank in V. The debtor resided in N. *Held*, that the debt was a speciality debt, and probate duty on the unpaid balance of the purchase-money was not payable in N., but only in V.—*Commissioner of Stamps v. Hope*, 65 L.T. 268.

- (i.) **P. C.—Trinidad—Practice.**—The meaning of Ord. xxviii., r. 12, of the ordinance for the constitution of the Supreme Court made in 1879, is that when the real merits of a controversy have not been disposed of on a demurrer, the Court should make such an order as would allow them to be properly tried. Where the Court, having overruled a demurrer to a statement of defence on Friday, ordered a reply to be delivered the same day, and the case to be tried on the Monday following, *held*, that the plaintiff was practically deprived of the possibility of a trial by jury, and that the judgment, which was delivered in favour of the defendant on the non-appearance of the plaintiff, must be set aside. *Semble*, that Ord. lvii., r. 6, is not applicable where a demurrer is overruled, and the demurring party allowed to plead.—*Pollard v. Harragin*, 65 L.T. 4.

Company:—

- (ii.) **Ch. D.—Action to Rectify Register—Winding-up—Amendment of Pleadings.**—In April, 1889, the plaintiff issued his writ against the defendants to have his name removed from the register. In August, 1889, he delivered his statement of claim, alleging misrepresentations in the prospectus. In November, 1889, a petition for winding-up was presented against the defendants, and in June, 1890, a winding-up order was made. In December, 1889, the plaintiff amended his statement of claim, alleging that the allotment of his shares was made by persons not duly appointed directors. *Held*, that a shareholder may claim relief on the grounds put forward before the winding-up, his rights being saved by the institution of legal proceedings before the winding-up, such proceedings being based upon a precise foundation on which the claim to relief is built up, and on which it eventually stands. *Held*, also, that each allegation of fraud is like a separate count in an indictment, and that one such allegation may succeed and another fail. *Held*, also, that the amendment of the statement of claim introducing new matter failed, but that amendments which merely enlarged and made more precise the original allegations were good.—*Cocksedge v. Metropolitan Coal Consumers' Association*, 64 L.T. 826; 39 W.R. 637.
- (iii.) **Ch. D.—Directors—Powers of—Borrowing.**—The directors of a trading company, unless specially prohibited by the articles of association, have an implied power to borrow and to effect mortgages upon the property of the company in furtherance of its objects.—*General Auction, Estate, and Monetary Company v. Smith*, 65 L.T. 188.
- (iv.) **Ch. D.—Directors—Powers—Refusal to Register Transfer.**—The directors of a company, in exercising their power of refusal to register a transfer of shares, must do so in good faith in the interest of the company, and with due regard to the shareholder's right to transfer his shares, and the question of the transferee's fitness must be fairly considered at a board meeting.—*In re Bell Brothers*; *s. p. Hodgson*, 65 L.T. 245.
- (v.) **Ch. D.—Director—Misfeasance—Liability—Winding-up—Stale Demand.**—The directors of a company made half-yearly payments of interest on its capital from 1869 to 1878, although no profits had ever

been earned. The company was wound-up in 1886. In 1890 the liquidator commenced an action against the representatives of two deceased directors. *Held*, that the estates of the directors were liable for the sums so paid, and that the liquidator was not debarred from recovering the same on the ground of a stale demand, as there was nothing to shew that the defence was prejudiced by the delay.—*Masonic and General Life Assurance Company v. Sharpe*, 65 L.T. 76; 39 W.R. 636.

- (i.) **Ch. D.**—*Director—Misfeasance—Agreement by Promoter to Purchase Qualification Shares—Companies Act, 1862, s. 165—Companies (Winding-up) Act, 1890, s. 10.*—The promoter of a company agreed with A., whom he had asked to become a director, that he would, at A.'s request, purchase from him, at the price which he paid for them, the qualification shares which he was about to take up. A. afterwards retired from the board, and the promoter purchased the shares according to the agreement. The company was wound-up, and the liquidator sought to make A. liable for a misfeasance or breach of trust in entering into the agreement, and applied for an order that he should repay the sum paid to him by the promoter with interest. *Held*, that as no loss had been proved to have been occasioned to the company, A. could not be so made liable.—*In re North Australian Territory Co.; Archer's Case*, 65 L.T. 140.
- (ii.) **C. A.**—*Director—Qualification Shares—Contributory.*—I. was appointed an original director of a company whose articles provided that each director should hold at least forty shares. Forty shares were allotted to him without his knowledge, and without any application, and he never knew of such allotment till after the winding-up of the company. He acted as a director one month after such allotment, and again two months later. Immediately after so acting for the second time, he acquired forty shares by transfer, and shortly after retired from the board. *Held*, in the winding-up of the company, that he was properly on the list of contributories in respect of the first forty shares, for that he must be taken to have known that it was his duty to qualify within a reasonable time, and that a reasonable time had elapsed, if not before he acted for the first time as a director, at all events before he so acted for the second time.—*In re Portuguese Consolidated Copper Mines; c. p. Lord Inchiquin*, L.R. [1891] 3 Ch. 28; 60 L.J. Ch. 556; 65 L.T. 841; 39 W.R. 610.
- (iii.) **C. A.**—*Memorandum of Association—Defective Signature—Registration—Winding-up—Jurisdiction.*—Decision of Ch. D. (see Vol. 16, p. 76, vi.) reversed on the evidence.—*In re National Debenture and Assets Corporation*, L.R. [1891] 2 Ch. 505; 60 L.J. Ch. 533.
- (iv.) **Q. B. D.**—*Registration—Companies Act, 1862, Part VII., s. 180—Private Partnership.*—Seven persons, constituting a firm of publishers, executed a deed reciting that the partners had sold their business to a limited company in consideration of certain fully paid-up shares which were the only assets of the partnership, and that they were desirous of modifying their partnership with a view to its registration as an unlimited company, and containing mutual covenants between the present partners and any future members of the company, that they should be subject to certain provisions therein contained. The sole object of the deed was to obtain registration as a company. *Held*, that the partnership ought not to be so registered.—*Reg. v. Registrar of Joint-Stock Companies*, 39 W.R. 708.
- (v.) **H. L.**—*Sale or Transfer of Business—Dissenting Shareholder—Companies Act, 1862, s. 161.*—Decision of C. A. (see Vol. 15, p. 75, i.) affirmed.—*Weston v. New Guston Co.*, 64 L.T. 815.

- (i.) **C. A.**—*Shares—Transfer—Certificate—No Title in Transferor—Estoppel.*—P. deposited with the plaintiff a “certificated” transfer of shares in the defendant company as security for advances. The plaintiff sent the transfer to the defendants, who issued to him a certificate that he was the owner of the shares. The plaintiff was never registered as owner. On the instructions of P., the plaintiff sold the shares for £400, and duly accounted to P. for the purchase-money. The defendants “certificated” the transfer to the purchaser. Subsequently the defendants refused to register the purchaser as owner of the shares, on the ground that the plaintiff had no title, inasmuch as P. had previously transferred the shares to X., who had been registered before the transfer to the plaintiff. The plaintiff was therefore compelled to purchase other shares at the cost of £700, and sued the defendants to recover that sum. *Held*, that the defendants were estopped by the issue of the certificate to the plaintiff, which was intended to be acted on in selling the shares, from denying that he was the owner of the shares, and that the sum of £700 was the true measure of damages.—*Tomkinson v. Balkis Consolidated Co.*, 60 L.J. Q.B. 558; 64 L.T. 816; 39 W.R. 693.
- (ii.) **C. A.**—*Winding-up—Contributory—Balance Order—Action for Calls—Merger—Companies Act, 1862, ss. 101, 102, 120.*—Decision of Ch. D. (see Vol. 16, p. 77, iii.) affirmed.—*Westmoreland Green and Blue Slate Co. v. Feilden*, L.R. [1891] 3 Ch. 16.
- (iii.) **Ch. D.**—*Winding-up—Compulsory Order—Right of Creditor—Companies (Winding-up) Act, 1890.*—The fact that the Court has, under the Act of 1890, larger powers than formerly in a compulsory winding-up, has not the effect of entitling a creditor to a compulsory order which he would not have been entitled to before that Act, unless he can shew that his rights will be prejudiced by a voluntary winding-up; but if a case for investigation is made out, it constitutes a stronger reason for a compulsory order than existed before the Act.—*In re Russell, Cordner & Co.*, 39 W.R. 635.
- (iv.) **C. A.**—*Winding-up—Execution Creditor—Sheriff.*—See Vol. 16, p. 114, vi. *Held*, reversing on this point the decision of Ch. D., that the goods seized, but not sold, by the sheriff were covered by the debentures, and that the debenture-holders were entitled to be paid out of the moneys in the hands of the liquidator, arising from the sale of such goods, in priority to the execution creditors, and therefore in priority to the claim for repayment made by the sheriff.—*In re Opera*, 39 W.R. 705.
- (v.) **C. A. & Q. B. D.**—*Winding-up—Subsequent Sale of Shares—Rectification of Register—Discretion—Companies Act, 1862, ss. 35, 87, 98, 153.*—Where shares in a company are sold and transferred after a compulsory winding-up order has been made, the transferee is not entitled to be registered as owner. The Court may order the register to be rectified by the insertion of the transferee's name, but the exercise of such power is discretionary, and the order ought not to be made except on strong grounds. After an order had been made for the compulsory winding-up of a building society, the A. company bought up a number of shares in the society, and had them transferred to nominees. It appeared that there would probably be a surplus of assets, and one of the nominees applied to have the register rectified by the insertion of his name, with the object of obtaining a vote at meetings held in the winding-up. The Court refused the application on the ground that no sufficient reason for it was shewn.—*In re The Onward Building Society*, L.R. [1891] Q.B.D. 462; 39 W.R. 718.

Compensation :—

- (i.) **Ch. D.—Exercise of Statutory Powers—Special Tribunal—Action.**—Where a special tribunal appointed by statute for ascertaining the compensation to be paid for damage sustained by the exercise of compulsory powers is no longer available, the compensation may be ascertained and enforced by action. A railway company was empowered by statute to deposit dredgings from a river upon the banks, "giving satisfaction for all damages which should be done" thereby, the damages to be ascertained by certain commissioners named by the statute. The company continued to exercise the power after all the commissioners had gone out of existence. *Held*, that the persons claiming compensation could enforce their claims by action. *Seem*, that the giving satisfaction for damages was not a condition precedent to the exercise of the power.—*Bentley v. M.S. & L.Ry. Co.*, 60 L.J. Ch. 641; 65 L.T. 22.

Conspiracy :—

- (ii.) **C. A.—Fraud—Cornering Market.**—Decision of Q. B. D. (*see* Vol. 16, p. 115, iii.) affirmed.—*Salaman v. Warner*, 60 L.J. Q.B. 624; 65 L.T. 132

Contingent Remainder :—

- (iii.) **Ch. D.—Equitable—Legal Estate Outstanding—Acquisition of Legal Estate—Intermediate Rents—Contingent Remainders Act, 1877.**—A testator, before the Act of 1877, devised freeholds, the legal estate being in mortgagees, to J. for life, with remainder to the children of J. attaining twenty-one, and gave his residuary real estate to J. In 1887 the mortgage was paid off, and the legal estate conveyed to J. to the uses of the will. J. died in 1888, leaving infant children. *Held*, that the acquisition by J. of the legal estate had not destroyed the equitable contingent remainder created by the will. *Held*, also, that the rents which accrued during the suspense of vesting went to J.'s estate as residuary devisee.—*Freme v. Logan*, 60 L.J. Ch. 562; 65 L.T. 183; 89 W.R. 696.

Contract :—

- (iv.) **C. A.—Implied Term.**—A term will not be implied in a contract, unless it is necessary in order to give the transaction such efficacy as both parties must have intended it to have, and to prevent such failure of consideration as cannot have been in the contemplation of either party; and the question whether such implication ought or ought not to be made, must depend on the particular facts of the case. In a case where A., a brewer, agreed in writing to sell to B., and B. agreed to buy, at prices thereby defined, all the grains made by A. during a period of ten years, *held*, that a term could not be implied that A. would not by any voluntary act, such as selling his business, prevent himself from continuing the sale of such grains during the period mentioned.—*Hamlyn & Co. v. Wood & Co.*, L.R. [1891] 2 Q.B. 488; 65 L.T. 286.
- (v.) **Ch. D.—Sale of Land—Statute of Frauds—Description of Vendor.**—The defendant signed a document agreeing to purchase a farm, and stating that a deposit had been paid to "Messrs. B., as agents for the vendor." The document also contained an agreement to pay for tenant-right "the landlord to be considered an out-going tenant." The vendor, C., was not named in the document, and did not sign it. The defendant afterwards wrote to the vendor's solicitors, mentioning C.'s name, and concluding "I should like a copy of our agreement." *Held*, that the vendor was not sufficiently described in the agreement; and that the

letter did not so clearly refer to the agreement, and shew the name of the vendor, as to cure the defect.—*Coombs v. Wilkes*, L.R. [1891] 3 Ch. 77; 65 L.T. 56.

- (i.) **Ch. D.**—*Validity—Illegal Consideration*.—The plaintiffs gave a written undertaking to the defendant society to make good part of a debt arising from the criminal default of the secretary of the society, which was expressed to be given in consideration of the society abstaining from suing their secretary for the amount. The directors had threatened to prosecute the secretary, and were aware that the plaintiffs, in giving the undertaking, were actuated by a desire to stop the prosecution. *Held*, that it was a term of the agreement that there should be no prosecution, and that the agreement was void.—*Jones v. Merionethshire Permanent Benefit Building Society*, L.R. [1891] 2 Ch. 587; 60 L.J. Ch. 564.

Copyright :—

- (ii.) **C. A.**—*Costs*—"Full Costs"—*Copyright Act*, 1842, s. 42.—The "full costs" to which a successful defendant is entitled, are the ordinary party and party costs, and not solicitor and client costs.—*Avery v. Wood*, 65 L.T. 122.
- (iii.) **C. A.**—*Picture—License to Publish—Proprietor—Copyright Act*, 1862, ss. 3, 4, 6.—A., the owner of the copyright in a picture, sent a letter to B., enclosing a photograph of the picture, and suggesting that B. should publish an engraving of it in his newspaper. *Held*, that such letter was not a licence to publish the print without further consent from A. A person in whom the copyright of a picture is vested as a trustee may be registered as the proprietor of the copyright, and may maintain an action in that character for an infringement of it; but if one person is the proprietor of the copyright and another person is registered as the proprietor, the two together cannot maintain such an action. Therefore where C., the registered proprietor, has assigned the copyright to D., and D. has not been registered as proprietor, C. and D. cannot maintain an action for infringement.—*London Printing and Publishing Alliance v. Cox*, 65 L.T. 60.
- (iv.) **C. A.**—*Work Produced Abroad—Publication in this Country—Interests of Publisher—International Copyright Act*, 1886, s. 6.—Decision of Q. B. D. (see Vol. 16, p. 117, i.) affirmed.—*Moul v. Groenings*, L.R. [1891] 2 Q.B. 443; 39 W.R. 691.

County Court :—

- (v.) **P. D.**—*Admiralty Jurisdiction—County Courts Admiralty Jurisdiction Act*, 1868, s. 21, sub-ss. (1) (2)—*County Courts Act*, 1888, s. 74.—The plaintiffs, owners of a steamship, brought an action in personam on the Admiralty side of the County Court within the district of which the defendants, charterers of the ship and consignees of the cargo, carried on their business, for damages for detention of the ship in unloading. *Held*, that the County Court had jurisdiction.—*The Hero*, L.R. [1891] P. 294.
- (vi.) **Q. B. D.**—*Remitted Action—Costs—Taxation—County Courts Act*, 1888, ss. 65, 116.—An action of contract brought in the High Court for more than £50 was remitted to the County Court after the plaintiff had recovered less than £20 under Order xiv. He recovered in all less than £50. *Held*, that he was not entitled to costs on the Supreme Court scale in respect of that part of the proceedings which had taken place in the High Court.—*Wilson v. Statham*, L.R. [1891] 2 Q.B. 261; 39 W.R. 686.

Easement:—

- (i.) **C. A.**—*Grants of Adjoining Tenements—Implied Reservation—Mortgage.*—Decision of Q. B. D. (see Vol. 16, p. 118, iii.) affirmed.—*Tawes v. Knowles*, 65 L.T. 124; 39 W.R. 675.
- (ii.) **Ch. D.**—*Light—Derogation from Grant—Grant of Vacant Land—Building Contemplated.*—W., in 1875, conveyed vacant land to the trustees of a religious body. The trusts were set out in the conveyance, and included a trust to build a chapel on the land in such manner as the grantees, with the consent of the religious body, should deem necessary or expedient, and the deed contained a covenant that all windows in the chapel looking out on other land of W. should be of fluted glass. A chapel was built on the land, having windows looking out on land retained by W. W. afterwards sold such other land to the defendant, who began to build on it so as to obstruct the lights of the chapel. Held, that W. had in effect given permission to the trustees of the chapel to erect the chapel in such manner as they thought fit, and that the chapel having been erected in a reasonable manner, neither W. nor his grantee could complain of its position, or of the way in which it was lighted; and that W. and his assigns were under an implied obligation not to obstruct the lights of the chapel.—*Bailey v. Icke*, 64 L.T. 789.
- (iii.) **Ch. D.**—*Light—Derogation from Grant—Lease by Mortgagee—Building Scheme—Conveyancing, &c., Act, 1881, s. 18.*—Building leases were granted by the mortgagee of plots forming parts of an estate which had been laid out for building. The mortgagees were not parties to the leases, which complied with sect. 18 of the Conveyancing Act. Held, that the mortgagees were bound by such leases, and could not derogate from the grant by obstructing, or permitting their assigns to obstruct, the lights of the houses built on the land so leased. Held, also, that even if the right of the lessees to light was subject to the right of the lessor and his mortgagees to build on the land adjoining, such lessees were entitled to an injunction to restrain the obstruction of their lights otherwise than by building.—*Wilson v. Queen's Club*, 65 L.T. 42.

Ecclesiastical Law:—

- (iv.) **H. L.**—*Public Worship Regulation Act, 1874—Representation—Discretion of Bishop—Second Representation.*—Decisions of C. A. (see Vol. 15, p. 40, iii., and Vol. 15, p. 79, v.) affirmed.—*Allcroft v. Bishop of London*; *Lighton v. Bishop of London*, 65 L.T. 92.

Estoppel.—See *Company*, p. 9, i. *Trustee*, p. 29, vi.

Evidence.—See *Fishery*, p. 12, v.

Fishery:—

- (v.) **Ch. D.**—*Navigable River—Public—Prescription—Evidence.*—The public cannot by prescription or otherwise obtain a legal right to fish in a non-tidal river, even though it is navigable. In an action for trespass on a several fishery, evidence of fishing as of right by the public was admitted in derogation of the plaintiff's title. Entries of the names of tenants in parish rate-books were admitted in proof of ownership of the fishery by the lessors, the plaintiff's predecessors in title.—*Smith v. Andrews*, L.R. [1891] 2 Ch. 678; 65 L.T. 175.

Friendly Society:—

- (vi.) **Q. B. D.**—*Arbitration—Friendly Societies Act, 1875, s. 22—Jurisdiction to Set Aside Award.*—The plaintiff, a member of a friendly society, met with an accident, and applied to the society for relief. The relief was

refused, and an arbitration took place under the rules of the society. *Held*, that the High Court had no jurisdiction to interfere with the award.—*In re Gollings and The Tradesmen's Friendly Society, Peterborough*, 64 L.T. 775.

Husband and Wife :—

- (i.) **C. A.—Desertion—Married Women (Maintenance in Case of Desertion) Act, 1886, s. 1.**—A husband and wife were living apart under a separation deed, by which the husband covenanted to make the wife a weekly allowance. The husband having discontinued the payment of the allowance, the wife offered to resume cohabitation, which the husband refused. *Held*, that to constitute desertion under the Act above mentioned, the parties must be living together as man and wife at the time of the desertion, that the husband's refusal of the offer to resume cohabitation did not constitute desertion, and that the magistrates had no power to order the husband to pay the wife a weekly sum.—*Reg. v. Leresche*, L.R. [1891] 2 Q.B. 418.
- (ii.) **P. D.—Divorce—Desertion.**—Wife's petition for divorce on the grounds of desertion and adultery. The marriage was in 1875, and in 1876 there was a temporary separation which, as the petitioner alleged, was on account of the respondent's intemperate habits. In 1877 the respondent finally left his wife, but they continued to correspond for some years. In 1886 the petitioner discovered that the respondent was living with another woman, and had children by her. *Held*, that in law there was no desertion prior to 1886, but that desertion in and since that year was established.—*Drew v. Drew*, 64 L.T. 840.
- (iii.) **P. D.—Divorce—Alimony Pendente Lite—Examination of Books of Husband and Partner—Divorce Court Rules, r. 191.**—A wife petitioned for divorce and for alimony pendente lite. An order was made for the husband to attend for cross-examination as to his means, and a subpoena duces tecum was served on the husband and his partner to produce certain books relating to their business. They objected to allow the books to be examined by the wife's legal representatives on the ground, (1) that the partner or the clients of the firm might be prejudiced, and that, as they were not parties to the proceedings, their business affairs ought not to be disclosed; and (2) that such examination, if proper at all, ought to be left till the question of permanent maintenance should arise. *Held*, that both objections should be overruled.—*Carsu v. Carew*, 65 L.T. 167.
- (iv.) **P. D.—Divorce—Condonation.**—A husband who had received from his wife a confession of adultery, went home with her, and they slept together upon that and the following night. He then sent her away to her relations, and they parted on affectionate terms. He immediately presented his petition for divorce. *Held*, that the fact of the parties sleeping together was not conclusive proof of condonation, but that the jury must consider that together with the other facts.—*Hall v. Hall*, 64 L.T. 837.
- (v.) **P. D.—Divorce—Husband's Petition for Settlement.**—A husband having obtained a divorce on the grounds of his wife's adultery, petitioned that certain jewellery, belonging to the wife should be sold, and the proceeds settled on her for life, with remainder to himself. His income was substantial, the wife's only £72 a year. The registrar reported against the petition. *Held*, that the petition must be dismissed.—*Schofield v. Schofield*, 64 L.T. 838.

- (i.) **P. D.—Divorce—Wife's Confession—Husband's Separation—Excuse.**—A wife made a confession of adultery to her husband, on which he left her, and some years after instituted proceedings for divorce, founded on subsequent adultery. *Held*, that the confession was a sufficient excuse for his leaving his wife, and that his delay in instituting proceedings was sufficiently explained by his want of means, and that he was entitled to a divorce.—*Faulkes v. Faulkes*, 64 L.T. 834.
- (ii.) **P. D.—Judicial Separation—Cruelty—Custody of Children—Guardianship of Infants Act, 1886, s. 7—Effect of Order.**—In appending to a decree for judicial separation on account of the husband's cruelty, a declaration to the effect that he was a person unfit to have the custody of the children of the marriage, the Court *held* that the effect of the declaration was to put upon him the onus of affirmatively proving himself to be a reformed character, and fit to be intrusted with the custody of the children, in case of any application which might be made in respect of their custody after the petitioner's death.—*Webley v. Webley*, 64 L.T. 839.
- See Married Woman*, p. 19, iii.

Infant:—

- (iii.) **C. A.—Apprenticeship Deed—Covenant to pay Premium.**—An infant executed a deed of apprenticeship containing a covenant to pay part of the premium three years and a-half after the date of the deed. In an action on the covenant the jury found that the arrangement was a proper and provident one for the infant, that the premium was a reasonable one, and that instruction had been given under the deed. *Held*, that the liability of the infant for necessary instruction stood on the same footing as that for other necessities, and that the fact that he had covenanted under seal for the payment of the premium was no bar to his liability.—*Walter v. Everard*, L.R. [1891] 2 Q.B. 369; 39 W.R. 676.
- (iv.) **C. A.—Guardianship.**—Decision of Ch. D. (*see* Vol. 16, p. 81, v.) affirmed.—*In re Violet Nevin*, 60 L.J. Ch. 542; 65 L.T. 85.
- (v.) **Ch. D.—Ward of Court—Delivery of Person.**—In the case of an order for delivery of the person of a ward of Court, the order should be counter-signed by the Lord Chancellor, and should direct the delivery to be made to the sergeant-at-arms attending the court.—*In re An Infant*; *G. v. L.*, 64 L.T. 782.

Injunction:—

- (vi.) **C. A.—Restrictive Covenant—Occupier.**—A. and B. were sued to restrain them from using a house in such a way as to break a restrictive covenant contained in the lease thereof. The house was vested in B. for a term under an underlease which had been assigned to him. It was not shown that A. had any estate legal or equitable in the house, but there was evidence that he was managing B.'s business which was carried on there. *Held*, that an injunction should be granted against A., as the evidence shewed that A. was in joint or sole occupation of the house, and was managing the business with notice of the covenant, and that even if he was a mere occupier, he might be restrained from using the house in a way forbidden by the covenant.—*Mander v. Falcke*, L.R. [1891] 2 Ch. 554; 65 L.T. 203.

Insurance:—

- (vii.) **Q. B. D.—Life—Policy for Benefit of Wife—Murder by Wife.**—Where a man insures his life for the benefit of his wife, under sect. 11 of the Married Women's Property Act, 1882, a trust is thereby created for

the benefit of the wife, and the insurance moneys form no part of the estate of the insured. If, therefore, the insured is murdered by his wife, his executors cannot recover on the policy, as she ought not to be allowed to benefit by her crime. The question whether she knew of the existence of the policy before she committed the murder is immaterial.—*Cleaver v. Mutual Reserve Fund Association*, 65 L.T. 220; 39 W.R. 638.

International Law :—

- (i.) **C. A.—Ambassador—Immunities of Attaché—Bonâ fide Appointment—Bankruptcy.**—A. was a British subject in business in London. In 1891 he was appointed by the Persian ambassador an honorary attaché to the embassy, and his name was sent to the Foreign Office as a member of the suite. His appointment was in no way recognised by the British Government. The appointment was obtained by him for the purpose of protecting him from his creditors, and was made inadvertently by the ambassador. *Held*, that he was not protected from bankruptcy proceedings.—*K. p. Cloete; in re Cloete*, 65 L.T. 102.

Joint Tenancy :—

- (ii.) **Ch. D.—Severance.**—A joint tenancy can only be severed by some act of a joint tenant which would preclude him from claiming by survivorship any interest in the subject-matter of the joint tenancy. A fund was in Court carried to the credit of three infants "as joint tenants." W., one of them, came of age, and became entitled to payment out of one-third of the fund. On March 20th, solicitors were instructed on his behalf to obtain payment, and on the next day they obtained leave to add to a pending summons an application for such payment. The summons was returnable on March 28th, on which day the parties attended. The evidence on the part of W. was complete, but owing to the press of business the summons was not heard, and it was adjourned till April 22nd. On April 2nd W. died. *Held*, that there was no severance of the joint tenancy. *Semble*, that if an order had been made there would have been a severance.—*Child v. Bulmer*, L.R. [1891] 3 Ch. 59; 65 L.T. 184.

Justices :—

- (iii.) **Q. B. D.—Refusal to Issue Summons—Discretion—Matrimonial Causes Act, 1878, s. 4.**—Justices had made an order that a husband should pay his wife a weekly sum. The husband, some time after the order, applied to the justices for a summons calling on his wife to shew cause why the order should not be varied by reduction of the weekly payment, upon the ground that his means had diminished. The justices, having heard the husband, refused to issue the summons. *Held*, that they had a discretion to grant or refuse a summons, and had exercised it properly. *Held*, also, that such discretion was not subject to review.—*Reg. v. Huggins*, 60 L.J. M.C. 189.

Landlord and Tenant :—

- (iv.) **C. A.—Breach of Covenant—Compensation—Conveyancing, &c., Act, 1881, s. 14.**—The "compensation" for breach of covenant which the tenant is liable to pay in order to defeat the landlord's right of re-entry, does not include the costs incurred by the landlord in consulting and employing a solicitor and surveyor in respect of the notice required by the statute.—*Skinner's Company v. Knight*, L.R. [1891] 2 Q.B. 542; 60 L.J. Q.B. 629; 65 L.T. 240.

- (i.) **Q. B. D.—Forfeiture on Bankruptcy—Assignment.**—A lease contained a covenant against assignment without the consent of the lessor, and also a proviso for re-entry if "the lessee, his executors, administrators, or assigns should become bankrupt." The lessee assigned the lease with the consent of the lessor, and subsequently became bankrupt. *Held*, that there was no forfeiture. *Quære*, whether the right to enforce a forfeiture on the bankruptcy of the lessee is affected by an annulment of the bankruptcy.—*Smith v. Gronow*, L.R. [1891] 2 Q.B. 394; 65 L.T. 117.
- (ii.) **C. A.—Mortgage—Lease by Mortgagor—Notice to pay Rent to Mortgagee—Effect of.**—A mortgagor, having no power to lease the premises, let the same to the defendant subsequently to the mortgage. The mortgagees gave notice to the defendant requiring him to pay them the rent which should thereafter accrue due. *Held*, that the mere fact of the defendant remaining in possession after such notice was not evidence of an agreement that he should become the tenant of the mortgagees.—*Towerson v. Jackson*, L.R. [1891] 2 Q.B. 484.
- (iii.) **Q. B. D.—Public House—Covenant not to Forfeit Licences—Breach of—Licensing Act, 1872, ss. 30, 31.**—The lessee of a public-house covenanted not to "do or suffer to be done on the premises any act whereby the licences necessary for using the said premises as an inn, tavern, or public-house may be forfeited, or the renewal thereof withheld." He was twice convicted of offences as such tenant, and the convictions were indorsed on the licence. He assigned his lease, and a subsequent occupant of the premises obtained a renewal of the licence. *Held*, that there had been a breach of the covenant.—*Harmann v. Powell*, 60 L.J. Q.B. 628; 65 L.T. 255.

Lands Clauses Act:—

- (iv.) **Ch. D.—8 & 9 Vict., c. 18, ss. 95, 96, 97—Compensation—Copyhold.**—A railway company, in exercise of their statutory powers, had taken possession of copyholds. The conveyance had been executed, and enrolled in the court-rolls of the manor. The lord required the company to enfranchise. Fines were payable by the custom of the manor, of two years' improved value on the death either of the lord or the tenant, and of three years' improved value on alienation. *Held*, that the compensation for enfranchisement ought to be estimated upon the basis of the improved value of the land which had accrued by reason of the company's works.—*Lowther v. Caledonian Railway*, 65 L.T. 192.

Licensing:—

- (v.) **C. A.—Change of Occupation—New Tenant—Second Licence—Licensing Act, 1828, s. 14.**—J., the tenant of a beerhouse, licensed previously to 1869, did not apply for a renewal at the annual general licensing sessions on August 30th, 1890. R. came into possession of the house as new tenant on September 5th. On September 27th he applied to special sessions for a licence as "new tenant" up to October 10th then next, but did not apply at the adjourned general sessions, held on the same day, for a renewal of J.'s annual licence from October 10th. At the next special sessions, held on January 3rd, 1891, R. applied again for a licence as "new tenant." *Held*, that R. was no longer a "new tenant" within sect. 14 of the Act of 1828, and that he could not claim the benefit of that section on the ground that the former tenant had omitted to apply since he had himself neglected to apply at the adjourned general sessions; and that the jurisdiction of the justices had been exhausted in R.'s case.—*Reg. v. Powell*, 60 L.J. Q.B. 594; 65 L.T. 210; *Reg. v. Swansea Justices*, 39 W.R. 630.

Limitations:—

- (i.) **C. A.—Legacy—Assent of Executor—Implied Trust—Real Property Limitation Act, 1874, s. 8.**—The time for bringing an action to recover a legacy is limited to twelve years next after the accrual of a present right to receive the same; and neither the fact that the executor has assented to the legacy, nor the fact that the legacy is coupled with an implied trust prevents the operation of the statute.—*Evans v. Moore*, 65 L.T. 128; 39 W.R. 627.
- (ii.) **Ch. D.—Sale of Land with Notice of Rights of Infant.**—Real estate was held in undivided shares by tenants in common in fee. One share was held by trustees upon trusts to apply the income or such parts as they should think expedient for the benefit of two infants during their minority, and for them absolutely on their attaining twenty-one. The other tenants in common were *sui juris*, and were legally and equitably entitled to their respective shares. The land was, in 1868, conveyed to a purchaser for value with notice of the infants' interests, by a deed which declared that X., a party thereto, should hold a sum representing the infants' share of the purchase money upon trusts for their benefit during their minority, and if they should execute the deed or convey their interest to the purchaser within one month after coming of age, then upon trust for them, but if not, then upon trust for the purchaser. The infants came of age in 1884 and 1885, but did not execute the deed or convey their share. The purchaser and his assigns having been in possession since the date of the deed, a person claiming under one of the infants sued to recover her share from the assigns of the purchaser, who contended that the claim was barred by the statute. *Held*, that it was not barred, as the purchaser had taken with notice of the infants' interest. *Seem*, that he was not in adverse possession, but only in possession in right of the infants. *Quære*, whether he did not take the property subject to a trust in favour of the infants in the event of their failing to take their shares of the purchase money.—*Young v. Harris*, 65 L.T. 45.
- (iii.) **C. A.—Simple Contract Debt—Separate Causes of Action—Postponement of Payment of Principal.**—Money was advanced under an agreement whereby the borrower agreed to pay interest quarterly on the sum advanced, and the lender agreed not to call in the principal for five years so long as the interest was regularly paid, provided that it should be lawful for him to call in the principal in case of default for twenty-one days in any quarterly payment of interest. No payment in respect of principal or interest was ever made. The lender sued on the agreement more than six years after the borrower had made default in payment of interest, but less than six years from the expiration of the period of five years mentioned in the agreement. *Held*, that the claim was barred.—*Reeves v. Butcher*, L.R. [1891] 2 Q.B. 509; 60 L.J. Q.B. 619; 39 W.R. 626.
See Administration, p. 2, i. *Trustee*, p. 30, ii.

Local Government:—

- (iv.) **Ch. D.—Debt—Rates of Subsequent Year—Elegit—Land Purchased out of Special Fund—Public Health Act, 1875, ss. 229-232.**—The costs of the plaintiff in a successful action against a local board to restrain the discharge of sewage into a watercourse are general expenses within the meaning of the Public Health Act, and can only be paid out of a fund common to all the parishes of the district. Therefore, land which has been purchased out of moneys which were a charge on a contributory

place within the district, and has been conveyed for purposes limited to that place, must be taken to be held in trust for that place, and cannot be taken in execution under a judgment for the costs above mentioned. *Held*, also, that a sum raised by rates to meet the expenses of the year 1890 could not be made liable for a judgment obtained in the year 1885; and that a sum which was a balance of moneys raised by loan for the special purposes of a contributory place could not be made liable for the said costs.—*Earl of Jersey v. Uzbridge Union Rural Sanitary Authority*, 64 L.T. 858.

- (i.) **Q. B. D.**—*New Building—Hoarding*.—An advertising company placed boardings of from thirteen to nineteen feet high on three sides of a piece of ground. The boardings were stayed, fastened, and tied together on the inner side. The enclosed space was used for making other boardings. *Held*, that the hoarding was not a new building within the meaning of a by-law made in pursuance of sect. 157 of the Public Health Act, 1875. — *Slaughter v. Mayor of Sunderland*, 60 L.J. M.C. 91; 65 L.T. 250.
- (ii.) **C. A.**—*Paving Expenses—Recovery of—Legal and other Expenses—Public Health Act, 1875, s. 268*.—A local board brought an action to enforce their charge for an apportioned part of the expenses of paving a street, and included in the amount apportioned an estimated sum in respect of legal and other expenses, including expenses of collection. The defendants contended that the estimated sum was not properly included in the apportionment. *Held*, that the objection could not be raised in the action, and that the only remedy of the defendants was by way of appeal to the Local Government Board.—*Walthamstow Local Board v. Staines*, L.R. [1891] 2 Ch. 606.
- (iii.) **Q. B. D.**—*Paving Expenses—Street—Order of Local Government Board—Public Health Act, 1875, ss. 4, 150, 276*.—An order of the Local Government Board declaring the provisions of sect. 150 to be applicable to certain places therein called and purported to be declared "streets," is not conclusive that such places are "streets." B. Road ran from a turnpike-road to a bridge, where it passed into another parish, and was from that point repaired as a highway by the local board of that parish. It was about 900 feet long. Several houses abutted on it on the south side; on the north side there were no houses for a distance of 785 feet from the turnpike road, and for the rest of its course it was bounded by a sewage farm, on which were two houses. It was a public highway. There was no evidence of formal dedication of the road, but there was evidence of its public use since 1835. *Held*, that it was a "street" within the meaning of sect. 4 of the Act.—*Fenwick v. Croydon Rural Sanitary Authority*, L.R. [1891] 2 Q.B. 216.

Locomotive :—

- (iv.) **C. A.**—*Highway—Negligence of Hirer—Liability of Owner—Locomotives Act, 1865, ss. 3, 7*.—The defendant, the owner of a traction engine to which his name and address were duly affixed, let the same on hire for three months. The plaintiff suffered injuries through the negligent management of the engine while it was used on the highway by the hirer. *Held*, that the defendant was not liable.—*Smith v. Bailey*, L.R. [1891] 2 Q.B. 403.

Malicious Prosecution :—

- (v.) **C. A.**—*Reasonable and Probable Cause—Honest Belief in Charge—Malice, Evidence of*.—In an action for malicious prosecution the jury found that the defendant did not take reasonable care to inform himself of the true facts of the case, that he honestly believed in the charge

made by him, but that he was actuated by malice and indirect motives. There was no direct evidence of malice and indirect motives, the evidence relied on by the plaintiff only proving that the defendant acted in haste, anger, and without proper inquiry. *Held*, that though the absence of reasonable and probable cause is sometimes evidence of malice, yet it is not so when the prosecutor honestly believes in the charge; that there was, therefore, no evidence of malice to be left to the jury, and that judgment must be entered for the defendant.—*Brown v. Hawkes*, 65 L.T. 108.

Mandamus:—

- (i.) **C. A.**—*Person in Service of Crown—Secretary of State for War—Royal Warrant—Right to Enforce Warrant.*—A retired officer complained that he had not, as provided by a Royal warrant, received such an addition to his retired pay as the Secretary of State should consider a “just equivalent” for loss sustained through the operation of the warrant. He applied for a mandamus commanding the Secretary of State to consider and determine what was a “just equivalent.” *Held*, that the complainant had no legal right to have the warrant performed, as it imposed on the Secretary of State no duty of a public nature, and no obligation beyond that which he owes to the Sovereign, and consequently no duty or obligation which could be enforced by mandamus at the suit of the complainant.—*Reg. v. Secretary of State for War.*—L.R. [1891] 2 Q.B.D. 326; 60 L.J. Q.B. 457; 64 L.T. 764.

Market:—

- (ii.) **Q. B. D.**—*Disturbance—Lease by Corporation—Sale on Land Leased—Covenant for Quiet Enjoyment—Markets and Fairs Clauses Act, 1847, s. 13—Public Health Act, 1875, s. 166.*—S. occupied premises, which he used for the sale of cattle, under leases granted by a borough corporation, which contained covenants for quiet enjoyment. The corporation, as the urban authority, established a cattle market in the borough, and published a list of tolls. *Held*, that the corporation had not by so doing derogated from their grant, and that S. had not acquired by the leases any right to sell cattle which the urban authority could not interfere with, and was consequently liable to a penalty for selling cattle for which no toll had been paid on his premises, which were within the borough, but not within the limits of the market. *Held*, also, that by sect. 166 of the Public Health Act the district of the urban authority was constituted the “prescribed limits” within the meaning of sect. 13 of the Markets, &c., Act, 1847.—*Spurling v. Bantoft*, L.R. [1891] 2 Q.B. 384.

Married Woman:—

- (iii.) **Q. B. D.**—*Separate Estate—Leaseholds—Death—Succession of Husband—Liability of Husband for Debt—Married Women's Property Act, 1882, ss. 3 (1) and 23.*—The wife of W., to whom she was married in 1881, held leaseholds which had been settled on her by a former husband by deed, for “her own proper use and benefit,” and with “full power and authority to sue and give receipts.” She borrowed money from S., which remained unpaid at her death intestate. The husband took possession of the leaseholds, without taking out letters of administration. S. sued the husband for the money lent to the wife. *Held*, that the leaseholds were the separate estate of the wife, and were bound by the wife's debts; that the husband had no need to take out letters of administration; and that he was liable, as the legal personal representative of the wife for the purpose of paying her debts, to the extent of the separate estate coming to him.—*Surman v. Wharton*, 64 L.T. 866.

- (i.) **C. A.**—*Separate Estate—Restraint on Anticipation—Liability of—Death of Husband.*—A married woman, having separate property subject to a restraint on anticipation, incurred a pecuniary liability. She was sued after the death of her husband, and judgment was recovered against her, limited to her separate property not subject to any restriction on anticipation. *Held*, that the removal, by her husband's death, of the restraint on anticipation did not make the property liable, and that a receiver of the income thereof could not be obtained under the judgment.—*Pelton Brothers v. Harrison*, L.R. [1891] 2 Q.B. 422; 89 W.R. 689.

Master and Servant:—

- (ii.) **H. L.**—*Common Employment—Sub-Contractor.*—Decision of C. A. (see Vol. 15, p. 48, iii.) reversed.—*Johnson v. Lindsay*, 65 L.T. 97.
See Bailment, p. 3, ii.

Metropolitan Building Acts:—

- (iii.) **Q. B. D.**—45 & 46 Vict., c. 14, s. 18—*Wooden Structure—Licence—Exemption.*—The proviso allowing a temporary wooden structure to be "erected by a builder for use during the alteration or repair of any building" without a licence, is limited in its application to structures erected by a builder for his use; and does not apply to a structure erected for the purpose of carrying on during the progress of the works the business usually carried on in the premises undergoing alteration or repair.—*The London County Council v. Candler*, 80 L.J. M.C. 114.

Metropolis Management:—

- (iv.) **C. A. & Q. B. D.**—*Building Line—Railway Company—Statutory Powers—Metropolis Management Amendment Act, 1862, s. 75.*—A railway company having compulsory powers to acquire land within the limits of deviation, and to construct the necessary works for their railway, may build a station on land acquired within such limits of deviation beyond the general line of buildings of a street.—*City and South London Railway Co. v. London C.C.*, L.R. [1891] 2 Q.B. 513; 60 L.J. M.C. 99.
- (v.) **Q. B. D.**—*New Street—Paving Expenses—Church—Unconsecrated Land—"Owner"*—*Metropolis Management Acts, 1855 & 1862—Ecclesiastical Commissioners—Church Building Acts—58 Geo. III., c. 45, s. 33; 59 Geo. III., c. 134, s. 34—3 Geo. IV., c. 72, s. 34—3 & 4 Vict., c. 60, s. 19; 8 & 9 Vict., c. 70, s. 13.*—The Ecclesiastical Commissioners having accepted the conveyance of a piece of land, and a church having been erected thereon, the church and the land adjoining were consecrated, the remainder of the land remaining unconsecrated. *Held*, that the Commissioners were not the "owners" of the unconsecrated portion of the land, and were not liable as such to contribute towards the expenses of paving a new street on which such land abutted.—*Plumstead Board of Works v. Ecclesiastical Commissioners*, L.R. [1891] 2 Q.B. 361; 64 L.T. 830; 39 W.R. 700.

Mortgage:—

- (vi.) **P. C.**—*Commission to Mortgagee—Just Allowances—Renewal of Promissory Note.*—When the contract between the mortgagor and mortgagee entitles the latter to a commission, he may claim it either in taking the account of what is due under the mortgage or under the head of just allowances. Where, however, the mortgagee was entitled

to a commission on accepting a renewal of the mortgagor's promissory note, and the note was never renewed, although payment thereof was not required, *held*, that no commission was payable.—*Bucknell v. Vickery*, 64 L.T. 701.

See Easement, p. 12, iii. *Landlord and Tenant*, p. 16, ii.

Municipal Election.—*See Practice*, p. 23, iii.

Negligence:—

- (i.) **Q. B. D.**—*Lloyd's Register of Ships—Certificate—Misstatement—Cause of Action.*—The committee of Lloyd's had furnished the owner of a yacht with a certificate which classed her as A1 for eleven years. The owner sold the yacht, and the purchaser afterwards discovered that she was not entitled to this classification. He then brought an action for damages against the committee, alleging that he had been induced by the representation in the certificate to pay for the yacht more than she was worth. *Held*, that there was no cause of action.—*Thiodon v. Tindall*, 60 L.J. Q.B. 526.

Notice.—*See Trustee*, p. 80, iii.

Patent:—

- (ii.) **Ch. D.**—*Agreement for Share in—Registration—Patents, &c., Act, 1883, s. 23—Detention of Letters Patent by Owner of One-third Share.*—The patentees of an invention requested C. to assist them in developing and procuring the adoption of their invention, which he agreed to do. They wrote him a letter by which they agreed to give him, in consideration of his "services as practical manager in working" the patent, "one-third share" of such patent from the date of the letter. C. gave his services as requested. They handed him the letters patent to assist him in negotiating a sale, but as he failed to do so within the time prescribed, they required him to return them the letters patent, which he refused to do. He had procured the letter to be registered as a document conferring an interest in the patent. The patentees sued C. to recover the letters patent, and moved to expunge the entry of the letter from the register. *Held*, that the letter was intended to confer, and did confer, on C. unconditionally a one-third share of the patent, and that even if it did not amount to an assignment of an interest therein, it was properly registered. *Held*, also, that when the projected sale failed, C. had no right to retain possession of the letters patent as against the owners of two-third shares in the patent.—*Stewart v. Casey*, 65 L.T. 40.
- (iii.) **Ch. D.**—*Threats of Proceedings—Injunction—Equitable Title—Patents, &c., Act, 1883, s. 32.*—F., the owner of a patent, agreed to assign it to the defendants. He afterwards commenced an action against the plaintiffs for infringement. The defendants then began to threaten the plaintiffs' customers with legal proceedings. *Held*, that as the defendants had no legal right to prevent the infringement, and the action for infringement had been brought by F., the defendants were not protected by sect. 32 of the Patents, &c., Act, 1883, and ought to be restrained from using such threats.—*Kensington & Knightsbridge Electric Lighting Co. v. Lane Fox Electrical Co.*, L.R. [1891] 2 Ch. 573; 64 L.T. 770; 39 W.R. 650.

Poor Law :—

- (i.) **C. A.**—*Rating—Part of a House—Structural Severance—Representation of the People Act, 1867, ss. 3, 7, 61—Parliamentary and Municipal Registration Act, 1878, s. 5.*—Decision of Q. B. D. (see Vol. 16, p. 130, iii.) affirmed.—*Allchurch v. Hendon Assessment Committee*, L.R. [1891] 2 Q.B. 486.
- (ii.) **Q. B. D.**—*Rating—Valuation of Property (Metropolis) Act, 1869, ss. 32, 34—Assessment of Parish—Alteration of Total—Justices—Compromise.*—The London County Council appealed to Quarter Sessions, objecting to the totals of the assessment of certain parishes as too low. A compromise was effected, and the justices were asked to enter judgment in accordance with the agreement, and to alter the totals in the valuation list to those agreed upon. They refused to do so in the absence of detailed accounts, showing how the new totals were arrived at. *Held*, that in regarding the incongruity between the totals and the details, which would result from the alterations agreed upon, the justices had acted upon a consideration apart from the facts which they ought not to have taken into account, and had therefore not heard and determined according to law.—*Reg. v. Edlin*, 65 L.T. 83.

Portions :—

- (iii.) **Ch. D.**—*Exclusion of "Eldest Son entitled to Estate"—Death without becoming Entitled.*—A person who is to be excluded from sharing in a portions fund by reason of his being, at a particular time, the eldest son entitled to a settled estate, is ordinarily entitled, if he dies before that time, to share as if he were a younger child; but he is not so entitled, if he has concurred, as remainderman in tail, in disentailing the estate, and in raising money by mortgage thereof out of which he has received a sum equal in value to a younger child's aliquot share in the fund. *Quære*, whether to exclude such eldest son it is necessary that he should receive a substantial amount of the sum raised.—*Saunders v. Boyd*, 60 L.J. Ch. 624; 65 L.T. 242.

Practice :—

- (iv.) **Ch. D.**—*Administration—Originating Summons—Creditors' Action—No Legal Personal Representative.*—A judgment creditor took out an originating summons against the husband of the judgment debtor, who had died intestate, as "the person entitled to take out letters of administration of the estate" of the deceased, for administration of that estate. The plaintiff moved for the appointment of a receiver. The defendant had applied for, but had not yet obtained, letters of administration. *Held*, that the summons was bad, even if treated as a writ, since it asked only for the administration of the estate, and there was no legal personal representative before the Court. *Held*, also, that the summons did not come within Order lv., r. 3, which was for relief against trustees, executors, or administrators. *Held*, therefore, that there was no action in which the order could properly be made, and that the motion must be dismissed.—*Richardson v. Leask*, 65 L.T. 199.
- (v.) **C. A.**—*Appeal—"Criminal Cause or Matter"—Order to abate Nuisance—Public Health Act, 1875, ss. 91, 96.*—The refusal by the Queen's Bench Division of an order nisi for a rule for a mandamus to a magistrate to state a case for the opinion of the Court upon a summons in respect of a smoke nuisance, is a judgment in a "criminal cause or matter from which there is no appeal."—*E. p. Schofield*, L.R. [1891] 2 Q.B. 428; *Rook v. Schofield*, 64 L.T. 780.

- (i.) **H. L.—Appeal—Special Leave—R.S.C., 1883, O. lviii., r. 15—Appellate Jurisdiction Act, 1876, s. 3.**—The refusal by the Court of Appeal to grant special leave to appeal when the time limited for appealing has expired, is not "an order or judgment" from which an appeal lies to the House of Lords.—*Payne v. Esdaile*, 60 L.J. Ch. 644.
- (ii.) **C. A.—Appeal—New Trial—Verdict against Weight of Evidence—Probate—Undue Influence—Mental Incapacity.**—Where a new trial is sought for on the ground that the verdict was against the weight of evidence, in a case where there is some evidence to support the verdict, it is not enough that the judge who tried the case, or the judges of the Court of Appeal, might have come to a different conclusion, but there must be such a preponderance of evidence against the verdict as to make it unreasonable that the jury, when properly directed by the judge, should have given the verdict they did. Where there is evidence to shew some mental incapacity, and also evidence to show some undue influence, it is easier to satisfy the Court that undue influence has been exercised than where there is no evidence of mental incapacity.—*Hampson v. Guy*, 64 L.T. 778.
- (iii.) **C. A.—Appeal—Municipal Election—Qualification—Special Leave—Judicature Act, 1881, s. 14.**—The decision of the Queen's Bench Division on the question of whether a person is entitled to be enrolled as a burgess, and elected a councillor, cannot be appealed against without special leave.—*Unwin v. McMullen*, 39 W.R. 712.
- (iv.) **C. A.—Appeal—Time for—Interpleader Issue, Judgment on—R.S.C., 1883, O. lvii., r. 15; O. lvii., r. 13.**—An appeal from the decision of a judge on an interpleader issue tried by him without a jury must be brought within twenty-one days.—*McNair & Co. v. Audenshaw Paint and Colour Co.*, L.R. [1891] 2 Q.B. 502; 65 L.T. 292.
- (v.) **C. A.—Appeal—Time for—Final or Interlocutory Order—R.S.C., 1883, O. lviii., r. 15; O. lxiv., r. 7.**—An order striking out a statement of claim, on the ground that it discloses no ground of action, is interlocutory and not final.—*Jones v. Insole*, 64 L.T. 708; 39 W.R. 629.
- (vi.) **Ch. D.—Contempt—Motion to Commit—Personal Service—Waiver—R.S.C., 1883, O. lii., r. 5; O. xlv., r. 2.**—Notice of motion to commit for contempt of court by breach of an injunction must be served personally on the contemnor; and when such personal service has not been effected two clear days before the day named for the hearing of the motion it must be dismissed, and the fact that the contemnor appears at the hearing to take an objection to the irregularity in the service does not operate as a waiver of the irregularity.—*Mander v. Falcke*, 64 L.T. 791.
- (vii.) **Q. B. D.—County Court—Appeal from—New Trial—County Courts Act, 1888, s. 120.**—There is no appeal to the High Court from an order of a County Court judge granting a new trial, when such order is made on the ground that the verdict is against the weight of evidence.—*How v. I. & N.W.R.*, L.R. [1891] 2 Q.B. 496.
- (viii.) **Q. B. D.—Costs—Refreshers—R.S.C., 1883, O. lxx., r. 27 (48).**—The right to a refresher only arises where a trial has lasted a "clear day" beyond the first five hours, whether "clear day" means a separate day of the week, or only an additional period of five hours. Therefore no refresher was allowed where a trial extended over parts of two days, lasting altogether about five hours and a quarter, and occupied less than five hours on each day.—*Walker v. Crystal Palace Gas Co.*, L.R. [1891] 2 Q.B. 300; 65 L.T. 86; 39 W.R. 716.

- (i.) **Q. B. D.**—*Counsel—Number of—Special Case.*—Upon the argument of a special case only one counsel is heard on each side, unless it is a case stated upon an order of sessions, when it is brought before the Court upon an order nisi to quash, and then all the counsel instructed on both sides may be heard.—*Spurling v. Bantoft*, L.R. [1891] 2 Q.B. 384.
- (ii.) **C. A.**—*Discovery—Subpœna Duces Tecum—Commission—Scotch Action*—6 & 7 Vict., c. 82, s. 5—R.S.C., 1883, O. xxxvii., r. 7.—An order was made by consent of the parties in a Scotch action for certain persons, who were not parties to the litigation, to attend before a commissioner in England, and produce certain documents named in the order. The parties having failed to attend, *held*, that there was no jurisdiction to order them to do so, as it was not an order for the examination of persons as witnesses, and for the production of documents as ancillary to the examination, but an order for discovery and production of documents before the trial by third persons who were not parties to and had no interest in the action.—*Burchard v. Macfarlane*; *s.p. Tindall*, L.R. [1891] 2 Q.B. 241; 60 L.J. Q.B. 587; 65 L.T. 282; 39 W.R. 694.
- (iii.) **P. D.**—*Divorce—Costs of Queen's Proctor—Collusion—Co-respondent*—20 & 21 Vict., c. 85, s. 34—23 & 24 Vict., c. 144, s. 7—41 Vict., c. 19.—The Court condemned the co-respondent, as well as the petitioner, in the costs of the Queen's Proctor, who had established pleas of collusion and connivance against the co-respondent and the petitioner, where the co-respondent had not been dismissed from the suit at the time the decree nisi was pronounced, and was duly served with the Queen's Proctor's pleas, although he did not appear thereto. The Court made an order rescinding the decree in the absence of the petitioner, who having cross-examined the Queen's Proctor's witnesses, and having given evidence in chief, failed to submit himself to cross-examination.—*Taplen v. Taplen*, 64 L.T. 870.
- (iv.) **C. A.**—*Divorce—Costs of Wife—Set-off—Solicitor's Lien.*—The husband's costs of an unsuccessful appeal by the wife in divorce proceedings may be ordered to be paid out of money which he has paid into Court to defray the wife's costs of the hearing; but the order will not be made to the prejudice of the lien of the wife's solicitor unless he has conducted himself so as to justify such a measure. Therefore, where the wife brought a hopeless appeal, but there was no ground for considering that her solicitor had acted vexatiously or oppressively in conducting it, *held*, that he ought not to be deprived of his lien on the fund for the costs of the wife's defence.—*Hall v. Hall*, L.R. [1891] P. 302; 65 L.T. 206.
- (v.) **Ch. D.**—*Injunction—Interim Order—Suppression of Material Facts—Discharge.*—Motion by the plaintiff for an injunction, or in the alternative to continue an interim *ex parte* injunction. The interim order had been obtained on suppression of material facts. There had been no notice of motion to discharge the interim order. *Held*, that an *ex parte* order may be discharged without formal notice of motion to discharge. On the evidence the Court granted an injunction in the terms of the interim order, but discharged the interim order, the plaintiff to pay the costs of it in any event.—*Boyce v. Gill*, 64 L.T. 824.
- (vi.) **P. D.**—*Legitimacy Declaration—Motion for Directions.*—The Court dismissed, with costs, an application, made upon motion, by the petitioner in a legitimacy declaration suit, asking for leave to cite a certain person, other than the Attorney-General, and for directions, such motion being contrary to the practice.—*Bain v. Attorney-General*, 64 L.T. 837.

- (i.) **Q. B. D.**—*Official Referee—Power to Order Commission—Appeal—R.S.C., 1883, O. xxxvi., rr. 48, 50—Arbitration Act, 1889, ss. 14, 15.*—An official referee has a general control over the cause or matter referred to him, and may therefore hear interlocutory applications, such as for a commission to examine witnesses. His decision on interlocutory matters may be appealed from to the judge at chambers.—*Hayward v. Mutual Reserve Fund Association, L.R. [1891] 2 Q.B. 236; 39 W.R. 624.*
- (ii.) **Ch. D.**—*Order Drawn Up but not Passed and Entered.*—Where an order had been drawn up, but never passed and entered, the Court allowed it to be re-drawn up, passed, and entered *nunc pro tunc*.—*Bullis v. Jones, 39 W.R. 619.*
- (iii.) **Ch. D.**—*Patent—Design—Particulars of Objection—Leave to Amend.*—The practice as to the terms on which leave to amend particulars of objection will be granted in an action to restrain infringement of a patent will be followed in a similar action with regard to a registered design.—*Morris Wilson & Co., v. Coventry Machinists' Co., 60 L.J. Ch. 524.*
- (iv.) **P. D.**—*Probate—Inspection of Testamentary Papers—20 & 21 Vict., c. 77, s. 26; 21 & 22 Vict., c. 95, s. 23.*—Where the solicitors and executors of a deceased testatrix had refused to give any information about previous wills alleged to have been executed by the testatrix to persons who believed themselves to have been benefited by them, the Court ordered them to bring into the registry all wills and testamentary papers of the deceased in their possession, and to allow the applicants to take copies of them.—*In the goods of Shepherd, L.R. [1891] P. 323.*
- (v.) **Ch. D.**—*Representation Order—Costs—R.S.C., 1883, O. xvi., r. 32, O. lxx., r. 1.*—On an adjourned summons for the decision of the Court on the construction of a will, three classes of issue were interested under the will, and representation orders had been made in respect of each class. *Held*, that costs must be allowed as between solicitor and client.—*Jenkins v. Davies, 64 L.T. 824.*
- (vi.) **C. A.**—*Trial by Jury—Action in Chancery Division—R.S.C., 1883, O. xxxvi., rr. 6, 7.*—The plaintiff, who had commenced an action in the Chancery Division for a nuisance, moved to have it transferred to the Queen's Bench division to be tried by a jury. The judge before whom the case had been twice on motion for injunction made the order. *Held*, that the Court of Appeal ought not to interfere with the exercise of his discretion, there being no reason for expecting a failure of justice from the action being tried as he had directed.—*Mangan v. Metropolitan Electric Supply Co.—L.R. [1891] 2 Ch. 551; 65 L.T. 202.*
See Company, p. 7, ii.

Prescription.—*See Fishery, p. 12, v.*

Railway :—

- (vii.) **C. A.**—*Debentures—Gross Receipts—First Charge—Working Expenses.*—By an agreement between the defendant company and the G.W.R. company, which was confirmed and made binding by Act of Parliament, it was provided that the interest on the debentures of the defendant company should be a first charge on the gross receipts. *Held*, that the debenture-holders had a charge on the gross receipts in priority to all working expenses.—*Proffitt v. Wye Valley Railway Co., 64 L.T. 669.*

- (i.) **C. A.**—*Terminal Charges*.—"Services incidental to the duty or business of a carrier" may be charged for by a railway company in addition to the maximum mileage rate, and include charges in respect of station accommodation for merchandise, and of the share of the general expenses of the station, of supervision and clerkage, and of shunting attributable to merchandise traffic.—*Sowerby & Co. v. G.N.R.*, 60 L.J. Q.B. 467.

Resulting Trust:—

- (ii.) **H. L.**—*Assignment in Trust for Creditors—Surplus*.—Decision of Ch. (see Vol. 15, p. 136, iii.) reversed.—*Smith v. Cooke*, 60 L.J. Ch. 607; 65 L.T. 1.

Revenue:—

- (iii.) **Q. B. D.**—*Corporation Duty—Income Applied under Act of Parliament—Charitable Purposes*—48 & 49 Vict., c. 51, s. 11, *Exemption Clauses* 2 & 3.—Where a corporation have actually applied income or profits for the benefit of the class intended by an Act of Parliament which creates a trust of the property from which the same are derived, such property is exempt from corporation duty. As to the exemption of property legally appropriated for "any charitable purpose," the test is whether the purpose of the trust is benevolent and in relief of those in want. Under an Act of 1763, certain shares of the C. common were allotted to a corporation, in trust for the freemen inhabitants of B. ward as compensation for freemen's rights of common. In 1632, by agreement with the lord of the manor, the fourth part of the common of H., subsequently called the "intack," was conveyed to the corporation in satisfaction of common rights, and the freemen inhabitants of B. ward had ever since exclusively enjoyed it. The allotments of C. common and the "intack" lay together, and were managed by "pasture masters," who applied the profits of the whole to the benefit of poor freemen and their widows. *Held*, that the allotments of C. common were exempt from duty, but not the profits of the "intack."—*In re Duty on Bootham Ward Strays*, 60 L.J. Q.B. 612.
- (iv.) **Q. B. D.**—*Customs (Wine Duty) Act, 1888, ss. 2, 3, 4, 5, 6—Assessment of Duty—Evidence of Value*.—To prove to the satisfaction of the commissioners of customs that the market value of sparkling wine, imported in bottle, does not exceed 15s. the gallon, it is not enough for the importers to produce evidence of the cost price and the cost of freight, but the commissioners are entitled to further evidence of the selling price of the wine.—*Leakey & Haig v. Dunglinsor*, 65 L.T. 152.
- (v.) **Q. B. D.**—*Duties on Settlements—Voluntary Settlement—Customs and Inland Revenue Acts, 1881, s. 38; 1889, s. 11*.—By a settlement made in contemplation of marriage, H. transferred personal property to trustees upon trust for herself for life, and after her death upon trust for such persons as she, notwithstanding coverture, should appoint. She made an appointment in favour of a niece, and died. *Held*, that the property appointed must be taken to be property passing under the settlement; that the settlement and the appointment constituted a voluntary settlement whereby a life interest was reserved to the settlor, and that duty was therefore payable in respect of the property.—*A.-G. v. Chapman*, L.R. [1891] 2 Q.B. 526; 60 L.J. Q.B. 602; 65 L.T. 119.

See Colonial Law, p. 6, iv.

Ship:—

- (i.) **C. A.—Bill of Lading—Pledge of—Property in Goods.**—H., in Canada, shipped goods to C., in England. H. received bills of lading of the goods made out to his order, which, together with bills of exchange drawn by him on C., he sold to Canadian banks. The bills of lading were sent to English banks with a hypothecation note, by the terms of which such banks were entitled to retain the bills of lading till payment of the bills of exchange unless satisfied with C.'s acceptances. The plaintiffs, at C.'s request, paid his acceptances in respect of some of the consignments of goods, and received from the holders of the acceptances the bills of lading of the goods. The goods had been warehoused at the defendants' warehouses for delivery against the shipowner's delivery orders. Before the plaintiffs had paid C.'s acceptances he had, through the negligence of the defendants' servants, obtained some of the goods without presenting any delivery orders. He then became insolvent, and the plaintiffs obtained delivery orders from the shipowners, and demanded delivery of the goods. On failure of the defendants to deliver the same the plaintiffs sued to recover their value. *Held*, that the plaintiffs, as pledgees of the bills of lading, were entitled at common law to recover the goods, notwithstanding that the defendants were not in possession of them when the plaintiffs' title thereto accrued.—*Bristol and West of England Bank v. M.R.*, 65 L.T. 234.
- (ii.) **C. A.—Charter-party—Cesser and Lien Clauses—Demurrage.**—Where it is possible the cesser and lien clauses in a charter-party should be construed as co-extensive. The word "demurrage" in the lien clause does not cover undue detention at the port of discharge, and the charterer is, therefore, not exempted for responsibility for such detention by the cesser clause.—*Clink v. Radford*, 89 W.R. 355.
- (iii.) **Q. B. D.—Charter-party—Loss of Cargo—Liability of Owner—Bill of Lading—Signature by Agent.**—F. agreed to sell a ship to G. & Co. for a company after the expiration of a charter-party entered into by them at the same time, in which F. was described as "owner," and G. & Co. as "merchants and charterers." F. was registered as owner and insured the ship. G & Co. took possession of the ship under the charter-party, and appointed the captain and crew. The plaintiffs shipped goods on board the ship under bills of lading which did not refer to any charter-party, and some of which were signed by the captain, and others by K., as agent. F. knew nothing of the bills of lading, and K. was the agent of G. & Co. The plaintiffs had no knowledge or notice of the charter-party, or of the relations between F. and G. & Co. The cargo was lost, owing to unseaworthiness. *Held*, that F. had allowed the captain and K. to appear before the world as his servant and agent, and was liable to anyone who contracted with them in a matter within the scope of their agency.—*Baumvöll Manufactur von C. Schleiber v. Gilchrest & Co. and Furness*, L.R. [1891] 2 Q.B. 310; 60 L.J. Q.B. 605; 65 L.T. 87.
- (iv.) **P. D.—Collision—"Not under Command"—Regulations Art. 5 (a), (c), (d).**—"Not under command" in the rules means that the course of a vessel cannot be so properly controlled or directed as to enable her to get out of the way of any peril she may have to encounter. A ship's speed was reduced, by an accident to her machinery, from eleven knots to three or four knots, at which speed her steering power was unaffected, though she might not have been able to reverse so quickly as before. She hoisted three red lights in place of the white light, and did not exhibit her red side light till the moment of collision with another vessel. *Held*, that there was no want of command, and that the

exhibition of the three red lights was misleading, and contributed, with the absence of the red side light, to the collision.—*The P. Caland*, L.R. [1891] P. 313.

- (i.) **P. D.**—*Collision—Trawler—Pyrotechnic Light—Regulations Art. 10, Sched., Part II.*—Order in Council, June 24, 1885.—A trawler is not required by the rules to shew a pyrotechnic light on all occasions when being approached by another vessel, but must shew such light in time to prevent collision when a vessel is approaching under such circumstances that there exists a risk of collision.—*The Orion*, L.R. [1891] P. 307.
- (ii.) **P. D.**—*Port of Distress—Sale of Cargo—Law of Flag.*—The plaintiffs, who were British subjects, shipped goods on the A., a German ship, for delivery in London. The A. put into Cape Town in consequence of bad weather, and had sustained damage. The master sold some of the cargo, including the plaintiffs' goods. Held, that the conduct of the master must be determined by the law of the flag.—*The August*, 60 L.J. P. 57.

See County Court, p. 11, v.

Solicitor:—

- (iii.) **Q. B. D.**—*Application to Restore to Rolls—Previous Applications Unsuccessful—Special Circumstances.*—The applicant was, in 1879, struck off the rolls in consequence of a conviction for obtaining money on false pretences. His trial had taken place in the absence of his counsel, his solicitor, and all his witnesses. He had made previous applications, which were refused, to be restored to the rolls, but the whole of the circumstances were not brought before the Court. He now produced a memorial with numerous signatures, showing that his conduct in the meantime had been irreproachable. Held, that, in the special circumstances of the case, he ought to be restored to the rolls.—*In re Brandreth*, 60 L.J. Q.B. 501; 64 L.T. 739; 39 W.R. 687.
- (iv.) **Ch. D.**—*Costs—Taxation after Payment—Special Circumstances*—6 & 7 Vict., c. 73, ss. 87, 41.—Where a client pays his solicitor's bill of costs, expressly subject to his "right to tax," which payment, made by cheque, is accepted and retained by the solicitor without reference to the condition, there are "special circumstances" which entitle the client to taxation after payment.—*E. p. Love*; *in re Williams*, 65 L.T. 68.
- (v.) **Ch. D.**—*Costs—Lien—Mortgage—Payment.*—Where a mortgagor has paid his mortgagee the principal, interest, and costs, and has taken a release, the mortgagee's solicitor has no right to retain the title deeds as against the mortgagor, even for costs due to him from the mortgagee for work done relating to the mortgaged property during the continuance of the mortgage, the equitable right of the mortgagor to have his deeds returned by the mortgagee on payment prevailing against the solicitor's lien claimed in right of the mortgagee.—*In re Llewellyn*, 65 L.T. 249; 39 W.R. 713.
- (vi.) **C. A.**—*Lien for Costs.*—Decision of Ch. D. (see Vol. 16, p. 141, ii.) reversed.—*Mackenzie v. Mackintosh*, 64 L.T. 706.

Tenant for Life:—

- (vii.) **Ch. D.**—*Settled Estate—Compensation Money—Minerals—Lands Clauses Act, 1845, ss. 7, 9, 69, 70.*—A tenant for life, though unimpeachable for waste, is not entitled to any portion of the capital of compensation money paid in respect of minerals sold by him to a railway company.—*In re Robinson's Settlement Trusts*, 65 L.T. 244; 39 W.R. 632.

See Will, p. 32, ii.

Trade Mark:—

- (i.) **Ch. D.—Fancy Words—Combination—Patents, &c., Act, 1883, s. 64 (1) (c), s. 74 (1) (b) (2).**—The plaintiffs were registered owners of a trade-mark consisting of the words "Pirie's Parchment Bank." They disclaimed the exclusive right to use either of the words "Parchment" or "Bank," which, at the time of the registration, were in common use in the trade, and denoted different kinds of paper. The plaintiffs used this mark for a particular kind of paper, both on the wrappers in which the paper was sold, and also as a watermark. *Held*, that the said words could not be registered in combination as a trade-mark. *Held*, also, that these words in combination were not fancy words. *Held*, further, that the mark could not be supported as a "brand," as it was not used exclusively as such. The word "brand" includes a watermark.—*Alexander Pirie & Sons v. Goodall*, 65 L.T. 80.
- (ii.) **Ch. D.—Registration—Entire Class—Partial User.**—The registration of a trade-mark for an entire class, followed by user in respect of only one description of goods in that class, does not give an exclusive right to use such trade-mark in respect of all descriptions of goods in the class.—*Hargreave v. Freeman*, L.R. [1891] 3 Ch. 39.
- (iii.) **C. A.—Special and Distinctive Words—User—Association with other Words and Marks.**—Decision of Ch. D. (see Vol. 16, p. 101, iv.) affirmed.—*Richards v. Butcher*, L.R. [1891] 2 Ch. 522; 60 L.J. Ch. 530.

Tramway:—

- (iv.) **C. A.—Liability for Damage from Non-repair of Road—Contract with Road Authority—Tramways Act, 1870, ss. 28, 29, 55.**—Where a tramway company has entered into a contract with the road authority whereby such authority has undertaken the repair of that portion of the road which the company was liable to repair, the company is not liable for injuries occasioned by the non-repair of such portion of the road to a person using the same.—*Alldred v. West Metropolitan Trams Co.*, L.R. [1891] 2 Q.B. 398; 60 L.J. Q.B. 631; 65 L.T. 138; 39 W.R. 609.
- (v.) **Q. B. D.—Regulations and By-Laws under Local Act—Breach by Servant—Liability of Company.**—A tramway company were convicted before Justices of a breach of a regulation of the Board of Trade made under a local Act, relative to lamps being placed and lighted on the front of an engine. *Held*, that the regulation was not invalid as a regulation, and that its subject-matter need not have been dealt with by a by-law; that the offence was sufficiently described in the information, being stated in the words of the regulation; and that the company were responsible for the personal neglect of their engine-driver.—*St. Helen's District Tramways Company v. Wood*, 60 L.J. M.C. 141.

Trustee:—

- (vi.) **C. A.—Enquiries by Mortgagees of Trust Estate—Duty to Answer—Liability.**—A trustee is under no obligation to answer enquiries as to the trust estate by an intending mortgagee, and if he does answer such enquiries, his only duty is to give an honest answer according to the actual state of his knowledge. A trustee, in answer to such an enquiry, gave a list of specified incumbrances on the interest of the *cestui-que trust*. He had received notices of other incumbrances, which he had forgotten. *Held*, that in the absence of estoppel, he was not liable to the mortgagee for the loss occasioned by the insufficiency of his mortgage and that his answer did not amount to a positive representation, that there were no other incumbrances than those specified so as to create an estoppel against him.—*Low v. Bouverie*, 60 L.J. Ch. 594.

- (i.) **Ch. D.—Investment—Authorised Investments—Trust Investment Act, 1889, ss. 3, 6.**—A testator, who died in 1887, by his will, dated in 1886, gave his residuary estate to trustees upon trust to convert the same, and invest the proceeds on the securities therein mentioned, and to hold the securities on trust, in the first place, to pay his son an annuity, and he directed and authorized his trustees to set apart and invest in any of the securities thereby authorised, such a sum as would be sufficient at the time of investment to pay the annuity, and to pay the same accordingly, with power to resort to the capital of the appropriated fund whenever the income of the same should be insufficient. *Held*, that the trustees were not authorised to appropriate such a sum as would, when invested in India $3\frac{1}{2}$ per cent. stock, an investment authorised by the Trust Investment Act, 1889, but not one of the securities authorised by the will, but were limited to the securities so authorised.—*Oothwaite v. Taylor*, 65 L.T. 144.
- (ii.) **Ch. D.—Limitations—Legacy—Breach of Trust—Trustee Act, 1888, s. 8, sub-s. 1 (b).**—In an action by residuary legatees against an executor and trustee for a legacy, in respect of which a breach of trust had been committed, no fraud being alleged, the defendant pleaded the Statute of Limitations, as more than six years had elapsed since the action might have been brought. *Held*, that as the action was against a trustee for a breach of trust, and was therefore one to which no existing Statute of Limitations applied within the meaning of the section above-mentioned, the statute could now be pleaded, and was a bar to the action.—*Swain v. Bringeman*, 65 L.T. 296.
- (iii.) **Ch. D.—Notice to One of Several Trustees—Inquiry by Incumbrances—Duty to Answer.**—By a marriage settlement a reversionary interest of the wife under a will was assigned to trustees. Questions arose as to the execution of the settlement, but the Court held, on the evidence that its execution was established, and that the execution had taken place under circumstances sufficient to constitute notice of it to S., one of the trustees of the will. An intending mortgagee of the reversionary interest inquired of the trustees of the will whether they had notice of any incumbrance. S. gave no answer; the other trustee said that he had no notice. The advance was made and notice of it given to the trustees of the will. S. died and a new trustee was appointed in his place. *Held* (1) that notice of the settlement to S. was notice to all the trustees of the will; (2) that a trustee is not bound to answer inquiries as to incumbrances; and that even if he were, a mortgagee who advanced his money without having received an answer to his inquiry did so at his peril; (3) that the trustees of the settlement had priority over the mortgagee, and that that position was not affected by the death of S., the only trustee who had notice.—*White v. Ellis*, 65 L.T. 214.

Unhealthy Dwellings:—

- (iv.) **Q. B. D.—Demolition—Notice to Owner—Definition of "Owner"—The Housing of the Working Classes Act, 1890, s. 29, Sched. 4, Form C.**—The definition of "owner," in the Act above mentioned, is that given by sect. 2 of the Lands Clauses Act, 1845, as "the person or corporation entitled to sell or convey" the property, and notice to such person or corporation of proceedings for demolition is sufficient, notwithstanding that the Form C. in the schedule is drawn as applicable to an owner under the Public Health Act, 1875, namely, a person in receipt of a rack-rent.—*Osborne v. The Skinners' Company*, 89 W.R. 715.

Valuer:—

- (i.) **C. A.—Negligence—Mortgage.**—Where a valuer is employed by an intending mortgagee to value property on his behalf, he is liable to the mortgagee for negligence in conducting the valuation in consequence of which the mortgagee suffers loss.—*See* Vol. 16, p. 101, i., *Scholes v. Brook*, 64 L.T. 674.

Vendor and Purchaser:—

- (ii.) **Ch. D.—Contract—Completion—Mines—Rents and Royalties.**—A. agreed to sell to B. her moiety of lands, of which they were seised in equal moieties. If the purchase should not be completed on May 1st, 1888, the vendor was to "receive the rents and profits of the said hereditaments and premises until the completion of the purchase in lieu of interest on the balance of the purchase-money." There was a stone quarry under the lands, which had been worked for some time. The purchase was not yet completed. *Held*, that the vendor was entitled to the rents and royalties received in respect of stone gotten from or under the lands comprised in the contract from the date thereof until completion.—*Leppington v. Freeman*, 65 L.T. 145.
- (iii.) **C. A.—Vendor in Possession—Duty to Preserve Property—Negligence—Claim after Conveyance.**—A vendor keeping possession of the property until conveyance is a trustee for the purchaser, and is bound as such to take reasonable care to preserve the property. Where a trespasser, without the knowledge of the vendor, who was in possession, removed a large quantity of surface soil, *held*, that the vendor was liable for breach of trust in taking no care to prevent such a removal, and that the purchaser could assert such liability after conveyance, the conveyance having been made while both parties were ignorant of the trespass.—*Clarke v. Ramuz*, L.R. [1891] 2 Q.B. 457.

Will:—

- (iv.) **Ch. D.—Construction—"Contents of Desk"—Choses in Action—Key of Box.**—A testator gave his desk, "with the contents thereof," to J.; he gave him a pecuniary legacy, and made him one of his executors and residuary legatees. The desk contained bank notes, coin, choses in action, and the key of a box in which some securities were kept. *Held*, that the choses in action passed by the gift as well as the bank notes and coin, including certain choses in action which were negotiable only after indorsement by the executors. *Held*, also, that possession of the key of the box gave no title to its contents.—*Robson v. Hamilton*, L.R. [1891] 2 Ch. 559; 65 L.T. 173.
- (v.) **C. A.—Construction—Forfeiture on Alienation—Absolute, Life, and Contingent Interests—Annulment of Bankruptcy.**—Decision of Ch. D. (*see* Vol. 15, p. 100, iv.) affirmed.—*Metcalf v. Metcalfe*, L.R. [1891] 3 Ch. 1; 60 L.J. Ch. 647.
- (vi.) **C. A.—Construction—Gift Over—Remoteness.**—Decision of Ch. D. (*see* Vol. 16, p. 144, vi.) affirmed.—*Smith v. Bence*, 60 L.J. Ch. 636.
- (vii.) **C. A.—Construction—Gift of Income during Life or Widowhood—Gift of Legacies after Wife's Death.**—Testator directed his trustees to pay the income of a fund to his wife during her life, or until she should marry again, and from and after her marrying again to pay her an annuity, and from and after her death he directed them to levy and pay certain

legacies, all of which were to be taken as vested immediately after his own death, although payment was postponed until after the death of his wife. And he gave a legacy to be divided among such charities as his wife should appoint by will, and made a residuary bequest. The wife married again. *Held*, that all the legacies were postponed until her death.—*Jeffray v. Treadwell*, L.R. [1891] 2 Ch. 646.

- (i.) **Ch. D.—Construction—Remoteness.**—A testator gave a fund to trustees on trust to "pay and divide the same equally between the present children of my son" J. (naming them), "and any other children who may hereafter be born as and when they shall respectively attain the age of twenty-five years," with power in the meantime to apply the income for their maintenance and education. There was also a power of advancement. J. survived the testator, who died in 1879. He had at the testator's death five children living; one child was born four months later, and two more subsequently. The eldest attained twenty-five in 1890. *Held*, that the children did not take vested interests; that the gift was to a class to be ascertained when the eldest attained twenty-five; and that the gift was void for remoteness.—*Mervin v. Crossman*, 65 L.T. 186; 39 W.R. 697.
- (ii.) **Ch. D.—Construction—Tenant for Life and Remainderman—Conversion—Power to Postpone—Income in Specie.**—A testator gave his residuary estate in trust to convert the same, and invest the proceeds as therein mentioned, with power to retain any securities existing at the time of his death during such period as they should think fit, and declared that his trustees should stand possessed "of the stocks, funds, shares, and securities for the time being constituting or representing the residuary personal estate and effects hereinbefore bequeathed and the income thereof" on trust to pay the income to tenants for life with remainder over. At the time of his death his estate included certain bonds which were repayable at par at a fixed date, and were now at a considerable premium in the market. The trustees had exercised their discretion in retaining these bonds unconverted. *Held*, that the tenants for life were entitled to the income of the bonds in specie, as there was a distinct gift of the income of what the trustees should hold for the time being, including the securities which in their discretion they retained.—*Wood v. Thomas*, 65 L.T. 142.
- (iii.) **H. L.—Construction—Relatives.**—Decision of Ch. (*see* Vol. 16, p. 29, i.) affirmed.—*Seale-Hayne v. Jodrell*, 65 L.T. 57.
- (iv.) **P. D.—Construction—Residuary Gift.**—A testator bequeathed to his wife "all my furniture, jewellery, pictures, wearing apparel, and other effects belonging to me at the time of my decease." The will made specific bequests to her of money, shares, securities, &c., and it directed her to pay his debts, and left to her discretion whether she would provide for his children by a previous marriage and a nephew. It contained no bequest to any other person. *Held*, that the words "all other effects" constituted her residuary legatee.—*In the goods of Jupp*, L.R. [1891] P. 300; 65 L.T. 166.
- (v.) **Ch. D.—Determinable Interest—"Payable to or Vested in"—Receiving Order.**—Gift of the income of a fund to A. for life, or until he should assign, charge, or incur the same, or become bankrupt, "or do or suffer something whereby the said income if belonging absolutely to him, or some part thereof, would become payable to or vested in some other person." A receiving order was made against A., and a meeting of creditors was held, but no further bankruptcy proceedings had been taken. *Held*, that A.'s interest determined.—*Sartoris v. Sartoris*, 60 L.J. Ch. 634; 64 L.T. 730.

- (i.) **Ch. D.—Forfeiture—Gift over on Assignment—Agreement to Settle.**—C. by an antenuptial agreement, agreed to settle any moneys which he should receive under his mother's will, on trust for his wife for life, with remainder to himself for life, with remainder to his children. His mother, by her will, in exercise of a special power, appointed a fund in favour of C. for life, with remainder to his children, and declared that if he should dispose of his life interest, or by any writing attempt to do so, or should have done or do anything by reason of which any part of the annual income would, if belonging to him absolutely, become legally payable to any other person, his life interest should cease. *Held*, that C.'s life interest was acquired under his mother's will, but that the object of the will being to create an interest incapable of assignment, and determinable on attempted alienation, the agreement could not be held to include it, and that there had been no forfeiture.—*Walker v. Crawshaw*, 60 L.J. Ch. 588; 65 L.T. 72; 39 W.R. 682.
- (ii.) **Ch. D.—Power of Appointment—Exercise of—Limited Power—Wills Act, 1837, s. 27.**—Lands were conveyed by A. to trustees upon trust to permit M. to receive the rents for her sole and separate use, free from the control of her then present or future husband, and upon further trust "for such person or persons not being her said present husband, or any friend or relative of his, and for such estates," as the said M. should by deed or will appoint. *Held*, that this was not a general power of appointment, so that a general devise of real estate contained in M.'s will did not operate as an execution of the power.—*Williams v. Mitchell*, 65 L.T. 218.
- (iii.) **P. D.—Probate—Codicils—Revocation—Revival.**—A. made a will in 1867, and two codicils in 1869 and 1874. In 1875 he made another will whereby he expressly revoked all previous wills and testamentary papers. Subsequently his two sisters, who were benefited by the codicil of 1874, and the will of 1875, died, and he made a codicil in 1881, disposing of the property which he had left to them, which he described as a codicil to his last will and testament, and which began with the words, "Whereas my two sisters named in my codicil dated May 12, 1874, are both since dead." *Held*, that the codicil of 1874 was not revived by such reference.—*In the goods of Dennis*, L.R. [1891] P. 326.
- (iv.) **P. D.—Probate—Revival—Mistake of Law and Fact.**—A testatrix, forgetting the existence of a will and codicil duly executed by her in 1885, or under a misapprehension as to the legal effect thereof upon an earlier will and codicil, executed, in 1889, a "second codicil" to the earlier will and codicil, which she thereby purported to "ratify and confirm." The solicitors who drew the first will and codicil, and the last codicil were not aware of the existence of the intermediate will and codicil. *Held*, that the first will and codicil were not revived by the last codicil.—*In the goods of Turner*, 64 L.T. 805.
- (v.) **P. D.—Probate—Two Wills—No Express Revocation Clause.**—A testatrix made a will in 1886, leaving all her property to her two sisters. Upon the death of one of them, the testatrix executed another will, which did not in terms revoke the earlier will, but which left all her property to the surviving sister, and appointed her sole executrix. Both wills were taken charge of by the testatrix, but after her death only the earlier will was found. The effect of both wills would be the same in the event which had happened. The Court refused probate of the contents of the second will and admitted the earlier will to proof.—*In the goods of Radcliffe*, 65 L.T. 165.
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Quarterly Digest

OF

ALL REPORTED CASES,

IN THE

Law Reports, Law Journal Reports, Law Times
Reports, and Weekly Reporter,

FOR NOVEMBER AND DECEMBER, 1891, AND JANUARY, 1892.

By C. H. LOMAX, M.A., of the Inner Temple,
Barrister-at-Law.

Accord and Satisfaction :—

- (i.) **Q. B. D.**—*Agreement to Compromise—Payment—Repudiation of Agreement—Stay of Action.*—Negotiations for compromise of an action went on simultaneously abroad between the plaintiff and the defendant's agent, and in London between the solicitors on both sides. The former resulted in a signed agreement, the latter only in the approval of a draft. The defendants paid certain moneys to the plaintiff, relying on the London negotiations, and afterwards repudiated the foreign agreement on the ground that their supposed agent had acted without authority. The plaintiff accepted the repudiation, and sought to continue his action, giving credit for the sum received as a payment on account. *Held*, that the action must be stayed unless the plaintiff brought into Court the sum received.—*Henderson v. Underwriting and Agency Association*, 65 L.T. 616.

Administration :—

- (ii.) **Ch. D.**—*Legacy—Debt—Forgiveness.*—Testatrix, by her will, gave a legacy to A., and appointed B. residuary legatee. By a codicil she gave further legacies to A. She appointed A. and B. executors. At the dates of the will and codicil A. owed considerable sums to the testatrix. The Court held on the evidence that the testatrix had intended that such legacies should be actually paid to A., and that the debt should not be set off against them, and, also, that B. was a party to the making of the codicil, and was aware of the intention of the testatrix that the legacies should be actually paid. *Held*, therefore, that B., as residuary legatee, could not claim to set-off the debt against the legacies.—*Leweson v. Beales*, L.R. [1891] 3 Ch. 422; 60 L.J. Ch. 793; 65 L.T. 406; 40 W.R. 90.

Arbitration:—

- (i.) **Q. B. D.**—*Appointment by Judge—Jurisdiction*—"Refusing to Act or Incapable of Acting"—*Arbitration Act, 1889, s. 5 (b.)*—A contract provided that differences should be referred to M., and failing him, to a person named by X. It was afterwards agreed that the arbitration should be conducted according to the *Arbitration Act, 1889*. M. made an award on certain differences, and then left the country. In his absence further differences arose, and X. named S. to act. S. refused to do so unless appointed by a Judge's order. *Held*, that there was no jurisdiction to make such an order, as the case was not one where the appointed arbitrator refused to act, or was incapable of acting.—*In re Wilson and The Eastern Counties Navigation and Transport Co., L.R. [1892] 1 Q.B. 81.*
- (ii.) **C. A.**—*Submission to Single Arbitrator—Refusal to Appoint—Discretion of Court—Arbitration Act, 1889, s. 5.*—The plaintiff and defendants had agreed to refer disputes to an "arbitrator or umpire." After disputes had arisen the plaintiff called on the defendants to appoint an arbitrator, and on their refusal to do so, he gave them written notice "to concur in the appointment of an arbitrator." They still refused, and the plaintiff, after seven days, applied to the Court to appoint an arbitrator. *Held*, that the submission was to a single arbitrator, that the notice was sufficient, and that the Court had no discretion to refuse to appoint.—*Eyre v. Mayor of Leicester, 40 W.R. 203.*
See Practice, p. 56, vii.

Bankruptcy:—

- (iii.) **H. L.**—*Act of—Notice of Suspension of Payments—Bankruptcy Act, 1883, s. 4, sub-s. 1.*—Decision of C. A. (*see Vol. 15, p. 71, iii.*) affirmed.—*Crook v. Morley, L.R. [1891] A.C. 316; 65 L.T. 389.*
- (iv.) **Q. B. D.**—*Act of—Notice of Suspension of Payment—Bankruptcy Act, 1883, s. 4, sub-s. 1.*—On December 14th the debtor's solicitor wrote to a creditor stating that he had been consulted by W. E. as to the position of his affairs; that a meeting of his creditors would be held on Wednesday next; that it appeared from a rough statement of affairs that W. E. was solvent, but unable to immediately realise his assets, and that if time were granted he would be able to pay all his creditors the full amount of their claims. The creditor was invited to attend the meeting in order that a satisfactory arrangement might be come to. On December 21st the creditor received another letter stating that the meeting of creditors had resolved to accept a composition, and containing a statement of the debtor's affairs, shewing liabilities £1,600 and assets £685. *Held*, that the letters amounted to notice by the debtor that he was about to suspend payment.—*E. p. Turner; in re Entwistle, 65 L.T. 349.*
- (v.) **Q. B. D.**—*Adjudication—Refusal to Accept Composition—Discretion of Court—Bankruptcy Act, 1883, ss. 18, 20.*—Where a receiving order has been made against a debtor, and a composition has been refused by the creditors, the Court has no discretion to refuse to adjudge the debtor a bankrupt for the mere purpose of enabling the creditors to reconsider the proposal for composition.—*E. p. Pinfold; in re Pinfold, L.R. [1892] 1 Q.B. 73; 65 L.T. 683; 40 W.R. 223.*
- (vi.) **Q. B. D.**—*Official Receiver Trustee—No Committee of Inspection—Employment of Solicitor—Bankruptcy Act, 1883, s. 57—Bankruptcy Rules, 1886, r. 117.*—The official receiver, when trustee in a bankruptcy

without a committee of inspection, is in the same position as an ordinary trustee, and must, if he desires to employ a solicitor, obtain the direct sanction of the Board of Trade.—*E. p. Duncan; in re Duncan*, 65 L.T. 681; 40 W.R. 159.

- (i) **Q. B. D.**—*Petition by Company—Presented by Secretary—Assets Locked up in Chancery Action*.—A petition by an incorporated company may be presented by the secretary on behalf of the company. The fact that considerable property to which debtors claim to be entitled is locked up in a Chancery suit is not a sufficient ground for dismissing a petition presented against them for non-compliance with a bankruptcy notice.—*E. p. Whitley; in re Whitley*, 65 L.T. 351.
- (ii) **C. A.**—*Proof—Interest Accruing after Bankruptcy—Bankruptcy Act, 1883, ss. 37, 40; Sched. 2, r. 21*.—Where a debt is by contract payable at a future date, with interest in the meantime, and the debtor becomes bankrupt before the time for payment, the creditor may prove for interest accruing after the date of the receiving order. The principal sum should be proved for as a present debt; then a rebate of interest at 5 per cent. should be deducted from the dividends upon it; the liability to pay interest should be valued, and the value proved for, the dividend on such value being paid without any rebate. If the rate of interest under the contract is 5 per cent., the principal sum should be proved for as a present debt, and no rebate should be made.—*E. p. Ador; in re Browne and Wingrove*, L.R. [1891] 2 Q.B. 574; 61 L.J. Q.B. 15; 65 L.T. 485; 40 W.R. 71.
- (iii) **C. A.**—*Receiving Order—Final Judgment—Order for Costs—Accounts and Inquiries—Bankruptcy Act, 1883, s. 4, sub-s. (g)*.—At the trial of a partnership action the Court ordered that the partnership should be dissolved, that certain accounts and inquiries should be taken and made, and that the defendant should pay the costs up to and including trial. *Held*, that the order for the payment of costs was a "final judgment" on which a receiving order could be made.—*E. p. Alexander; in re Alexander*, 40 W.R. 202.

See Scotch Law, p. 63, iii. Sheriff, p. 64, iv.

Bill of Exchange:—

- (iv) **H. L.**—*Acceptance—Qualified—Bills of Exchange Act, 1882, ss. 8, 19, 36*.—Decision of Q. B. D. (*see* Vol. 16, p. 4, ii.) affirmed.—*Meyer v. Decroix*, L.R. [1891] A.C. 520; 65 L.T. 653.
- (v) **Ch. D.**—*Indorsement in Foreign Country—Sale under Judgment—Conflict of Laws—Bills of Exchange Act, 1882, ss. 2, 36, sub-s. (2), 59, 72*.—The case of bills of exchange forms no exception to the general rule that the rights of transferor and transferee on a transfer of a document of title to a debt, or to an interest in personal property, are governed by the laws of the country where the transfer takes place, although the debt may be due from persons living in, or the personal property may be situate in a foreign country. An English bill of exchange, drawn and accepted by English firms, was indorsed to the order of M. M. indorsed it in blank, and handed it in Norway to S., the plaintiffs' agent, for valuable consideration. The bill was seized in Norway under a judgment obtained there against a member of the plaintiffs' firm. The bill, which was overdue, was sold by public auction; and by the law of Norway a good title was thus conferred on the purchaser, the Norwegian law not recognising any difference as to negotiability between a current and an overdue bill. The bill was sold

in Sweden to the K. bank, who claimed it as *bonâ fide* holders for value. The law of Sweden is the same for this purpose as that of Norway. *Held*, that the Norwegian law governed the case, and that the K. bank were entitled.—*Alcock v. Smith*, 65 L.T. 335.

- (i.) **H. L.**—*Payment and Discharge—Cancellation without Authority—Liability of Agent for Collection.*—The agent of a bank was employed by the holders of a protested bill to obtain payment of it. The acceptors offered to pay the bill and the protest charges, on condition that they should not be called on to pay interest and expenses. The agent, without waiting for the authority of the holders, took payment of the bill and protest charges, marked the bill paid, and delivered it to the acceptors. The holders refused to agree to the conditions, or to accept the sum tendered, and received back the cancelled bill. They sued the acceptors for the amount of the bill, with interest and costs, and obtained a decree, but the acceptors became bankrupt. *Held*, that the bank was liable for the amount of the bill, with interest, and for the costs of the action against the acceptors; but was entitled to an assignation of the rights of the holders against the drawers of the bill.—*Bank of Scotland v. Dominion Bank*, L.R. [1891] A.C. 592.

Charity:—

- (ii.) **Ch. D.**—*Administration—Application for Scheme—Withdrawal—Effect of—Charitable Trusts Act, 1860, ss. 2, 4.*—Where an application has been made to the Charity Commissioners for a scheme for the administration of a charity, the withdrawal of the application before the Commissioners have made an order will not deprive them of their jurisdiction.—*In re Poor Lands Charity, Bethnal Green*, L.R. [1891] 3 Ch. 400; 60 L.J. Ch. 742; 65 L.T. 686; 40 W.R. 151.
- (iii.) **C. A.**—*Charitable Bequest—Maintenance of Tomb—Perpetuity—Gift over.* Bequest to a charitable institution, on condition that they should keep the testator's tomb in repair, with a gift over to another charitable institution on failure to comply with the condition. *Held*, that the rule against perpetuities did not apply, and that the condition was valid.—*Tyler v. Tyler*, L.R. [1891] 3 Ch. 252; 60 L.J. Ch. 686; 65 L.T. 367; 40 W.R. 7.

Colonial Law:—

- (iv.) **P. C.**—*Lagos—Bankruptcy—Jurisdiction of Supreme Court.*—The Supreme Court of the Gold Coast Colony had no bankruptcy jurisdiction in 1877, and could not, at that time, act as an auxiliary to the English Court under the Bankruptcy Act, 1869, sect. 74. The Bankruptcy Act, 1869, applies to all Her Majesty's dominions, and therefore an adjudication under that Act vests in the trustee in bankruptcy the bankrupt's title to real estate situate in Lagos, subject to any requirements prescribed by the local law as to the conditions necessary to effect a transfer of real estate there situate. Some of the bankrupt's land having being taken under the Public Lands Ordinance, 1876, *held*, that costs were rightly given under the Petitions of Rights Ordinance, 1877, sect. 8, against the Government of the Colony who had resisted payment of the price to the appellants.—*Callender, Sykes & Co. v. Colonial Secretary of Lagos*, L.R. [1891] A.C. 460; 60 L.J. P.O. 33; 65 L.T. 297.
- (v.) **P. C.**—*New South Wales—Criminal Jurisdiction—Offence Committed without the Colony.*—The Criminal Law Amendment Act, 1883, sect. 54, enacts that, "whosoever being married marries another person during the lifetime of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven

years." *Held*, that these words must be intended to apply to those actually within the jurisdiction of the Legislature, and consequently that there was no jurisdiction to try the appellant for the offence of bigamy alleged to have been committed in the United States of America.—*Macleod v. Attorney-General for New South Wales*, L.R. [1891] A.C. 455; 60 L.J. P.C. 55; 65 L.T. 321.

- (i.) **P. C.**—*New Zealand—Maori Will—Probate—Informality.*—The rules which govern Courts of Probate must not be relaxed in the case of alleged testamentary papers executed by Maoris on their death-beds. Strict proof must be given of a will which is informal, and signed by mark instead of by the testator's usual signature, and which has been obtained from him by one of the propounders who has a substantial interest in its provisions, and is witnessed by two of her relations. Such a will is not invalid; but the *onus probandi* may be increased by circumstances, and the presumption may be even conclusive against the validity of the instrument.—*Donnelly v. Broughton*, L.R. [1891] A.C. 435; 60 L.J. P.C. 48; 65 L.T. 558; 40 W.R. 209.
- (ii.) **P. C.**—*Victoria—Land Tax—Transfer for Value.*—Under the Land Tax Act, 1877, sect. 4, sub-sect. 3, in order to exempt the owner of land from the payment of tax, the land must have passed from him, and the consideration passed from the transferee, without any secret understanding or trust.—*Harding v. Commissioners of Land Tax*, L.R. [1891] A.C. 446; 40 W.R. 193.

Company:—

- (iii.) **C. A.**—*Action to Rectify Register—Winding-up—Amendment of Pleadings.*—Decision of Ch. D. (see Vol. 17, p. 7, ii.) affirmed.—*Cocksedge v. Metropolitan Coal Consumers' Association*, 65 L.T. 432.
- (iv.) **C. A.**—*Director—Misfeasance—Agreement by Promoter to Purchase Qualification Shares.*—Decision of Ch. D. (see Vol. 17, p. 8, i.) reversed.—*In re North Australian Territory Co.; Archer's Case*, 40 W.R. 212.
- (v.) **Ch. D.**—*Memorandum of Association—Alteration of Objects.*—The Court approved of the alteration of the objects of a marine insurance company so as to include the additional businesses of insuring against risks connected with carriage by sea or land not being strictly marine risks, and also of granting life and accident assurances connected with transit by sea and land, it being proved that such additional businesses could be advantageously combined with marine assurance. The order was made subject to an alteration in the name of the company, to give notice of the extension of its business.—*In re Alliance Marine Assurance Co.*, 65 L.T. 554.
- (vi.) **Ch. D.**—*Memorandum of Association—Alteration—Consent of Court—Condition.*—On confirming an alteration in the memorandum of association of a company, the effect of which was to enlarge the area of the company's operations, the Court made it a condition that the name of the company, which indicated that its operations were confined to one country, should be altered so as no longer to suggest such a limitation.—*In re Indian Mechanical Gold Extracting Co.*, L.R. [1891] 3 Ch. 538; 61 L.J. Ch. 33; 40 W.R. 184.
- (vii.) **C. A.**—*Registration—Private Partnership.*—Seven persons constituting a firm, sold their business to a company, receiving payment in shares, which then constituted the only assets of the partnership. They executed a deed reciting the sale, and that they were desirous

of modifying their partnership with a view to its registration as an unlimited company, and containing mutual covenants between the present partners and any future members of the company that they should be subject to the provisions of the deed. The sole object of the deed was to obtain registration as a company. *Held*, that the partnership ought not to be so registered.—*Reg. v. Registrar of Joint Stock Companies*, L.R. [1891] 2 Q.B. 598; 61 L.J. Q.B. 3; 65 L.T. 392.

- (i.) **Ch. D.—Shares—Surrender of—Issue of New Shares.**—A company's articles gave power to issue new shares on such terms as the company should, by special resolution, determine; and provided that subject to any special resolution such new shares should be offered to the shareholders in proportion to their holdings; and the directors were empowered to accept surrenders of shares from any members of the company on such terms as might be agreed upon. *Held*, that special resolutions authorising the issue of new shares with preferential rights, and empowering the directors to allot the same to the shareholders in consideration of the surrender of an equivalent amount of fully paid-up ordinary shares, were not *ultra vires*, provided the surrenders were made *bonâ fide*, and not for the purpose of enabling any shareholders to escape liability. — *Eichbaum v. City of Chicago Grain Elevators, Limited*, L.R. [1891] 3 Ch. 459; 61 L.J. Ch. 28; 65 L.T. 704; 40 W.R. 153.
- (ii.) **Ch. D.—Winding-up—First Meeting of Creditors—Proof—Unliquidated Debt—Companies (Winding-up) Act, 1890, schedule 1, clauses 7, 11.**—At the first meeting of creditors of a company in liquidation a proof for a specific sum may be admitted for the purpose of voting, if it is properly verified by affidavit, although it is partly in respect of services rendered subsequently to the commencement of the winding-up. *Quære*, whether an appeal to the Court will lie where such proof was not objected to at the meeting.—*In re Canadian Pacific Colonisation Corporation*, 40 W.R. 40.
- (iii.) **Q. B. D.—Winding-up—Seizure of Goods—Staying Proceedings—Companies Act, 1862, ss. 133, 138, 163.**—Where the goods of a company have been taken in execution after the passing of a resolution for voluntary winding-up, the Court has jurisdiction to stay further proceedings in the execution.—*Westbury v. Twigg & Co.*, L.R. [1892] 1 Q.B. 77; 61 L.J. Q.B. 32; 40 W.R. 206.

Conflict of Laws.—*See* Bill of Exchange, p. 37, v.

Contempt of Court :—

- (iv.) **Ch. D.—Intimidation—Costs.**—The plaintiff endeavoured to intimidate a witness in the action. He failed to appear to a motion for commitment. *Held*, that he must be committed, but that the order must be made without costs.—*Bromilow v. Phillips*, 40 W.R. 220.
- (v.) **Q. B. D.—Privilege of Parliament—Bankruptcy—Bankruptcy Act, 1863, s. 27.**—The privilege of members of Parliament, which protects them from arrest for contempt of Court in not obeying civil process, does not extend to cases where the contempt is in its nature or by its incidents of a criminal character. A member of Parliament refused to submit himself to be examined on oath pursuant to a summons issued under sect. 27 of the Bankruptcy Act. *Held*, that the member was protected by his privilege, and that an order for committal ought not to be made.—*E. p. Lindsay; in re Armstrong*, 65 L.T. 464; 40 W.R. 159.

Contract :—

- (i.) **Q. B. D.—Building Agreement—Quantity Surveyor—Custom of Trade—Action for Fees.**—A quantity surveyor was employed by an architect to take out quantities in respect of a certain building. The quantity surveyor's fees were, in accordance with the custom of the trade, included in the estimate of the builder whose tender was accepted. *Held*, that the quantity surveyor had a right of action against the builder for his fees.—*North v. Bassett*, 40 W.R. 223.
- (ii.) **Q. B. D.—Lease—Parol Representations—Untrue—Right of Action.**—The defendant demised a house to the plaintiff by lease. The defendant had previously said that he would carry out certain improvements to the water-closet, and before the execution of the lease said that the water-closet had been put in perfect order. The lease contained no reference to the water-closet, or the improvements therein, but the plaintiff alleged that he was induced to take the lease by the defendant's representations. He sued to recover damages in respect of an illness alleged to have been caused by the defective state of the water-closet. *Held*, that the representations did not amount to an agreement, and that there was no right of action for a misrepresentation in the absence of fraud.—*Burtal v. Bianchi*, 65 L.T. 678.
- (iii.) **C. A.—Validity—Illegal Consideration.**—Decision of Ch. D. (see Vol. 17, p. 11, i.) affirmed.—*Jones v. Merionethshire Building Society*, 65 L.T. 685.
- (iv.) **Ch. D.—To Advance Money—Breach of—Specific Performance—Damages.**—P. mortgaged property to the defendants to secure £7,500 and further advances up to a certain amount, which the defendants agreed to make when called upon, but no particular fund was specified or appropriated for the purpose of making such further advances. P. then mortgaged the same property to the plaintiffs to secure £1,000 and further advances, and assigned to them his right to call for the further advances under the first mortgage. The defendants, with notice of such second mortgage and assignment, subsequently advanced £500 to P. in pursuance of their contract. P. became insolvent, and the plaintiffs sued the defendants, seeking to recover the amount of such further advance of £500, or damages for the breach of contract to make such advance. The defendants admitted the priority of the plaintiffs' charge for £1,000 over their further advance of £500. *Held*, that the action was not maintainable.—*Western Waggon and Property Co. v. West*, 40 W.R. 183.

Costs :—

- (v.) **C. A.—Taxation—Shorthand Notes—Carbon Copies—Copies for Use of Solicitor having Transcript.**—In taxation of costs, copies of documents made by the carbon process ought not to be allowed for at the rate of fourpence a folio. A charge cannot be allowed for a copy of the transcript of a shorthand writer's notes of proceedings before an arbitrator to be used by a solicitor who acts as counsel in the arbitration, if he has in his possession the transcript from which the copy is taken.—*E. p. Latimer, Clarke, Muirhead & Co. ; in re Morse*, 61 L.T. 552.
- (vi.) **P. D.—Probate—Undue Influence—Plea not Established—Costs out of Estate.**—A will was opposed on the ground of undue influence. The Court found that the undue influence was not proved, and pronounced for the will; but, finding as a fact that the litigation had been caused by the duplicity and false statements of the testator, gave costs to all parties out of the estate.—*Cousins v. Tubb*, 65 L.T. 716.

County Court:—

- (i.) **Q. B. D.**—*Appeal without Leave—Ejectment—County Courts Act, 1888, s. 120.*—There is no appeal without leave from the decision of a county court in an action for the recovery of tenements, whether the parties are landlord and tenant or otherwise, or whether the title to such premises is in question or not, where the yearly rent or value thereof does not exceed £20.—*Earl of Shrewsbury v. Garfield*, 60 L.J. Q.B. 765.
- (ii.) **Q. B. D.**—*Jurisdiction—Mandamus.*—Where a county court judge, after hearing so much of a case as relates to the jurisdiction, declines to hear and determine the case, erroneously considering that he has no jurisdiction, an order in the nature of a mandamus will lie to compel him to hear and determine it.—*Reg. v. Southampton Judge*, 65 L.T. 320.
- (iii.) **Q. B. D.**—*Refusal of New Trial—Appeal—County Courts Act, 1888, s. 120.*—The order of a county court judge refusing a new trial is subject to an appeal to the High Court.—*Pole v. Bright*, 40 W.R. 95.
- (iv.) **C. A.**—*Jurisdiction—Admiralty—Pilot.*—The Admiralty side of a County Court has no jurisdiction to entertain an action *in personam* against a pilot for negligence.—*Reg. v. City of London Judge*, 40 W.R. 215.

Covenant:—

- (v.) **Q. B. D.**—*Quiet Enjoyment—Conveyance of Undivided Moieties—Trustee—Measure of Damages.*—Land was conveyed by A. and B. as owners of undivided moieties. A. was a trustee of his moiety, and B. was beneficial owner of his. In an action by the purchaser for breach of the covenant for quiet enjoyment, *held*, that B. was liable only to the extent of half the damage sustained. The breach of the covenant consisted in the existence of rights of way over the land. *Held*, that the measure of damages was (1) the difference in the value of the land free from the rights of way, and subject thereto; (2) the costs incurred by the purchaser in defending an action by the claimant of the rights of way, and of an appeal by the purchaser, two judges in the Court of first instance having differed as to the existence of the rights of way.—*Sutton v. Baillie*, 65 L.T. 528.

Criminal Law:—

- (vi.) **Q. B. D.**—*Intimidation—Trade Union—Conspiracy and Protection of Property Act, 1875, s. 7, sub-s. 1.*—A. was an employer of labour, and employed men who were, and also men who were not, members of trade unions. B., the secretary of a trade union, together with the secretaries of other trade unions to which some of A.'s labourers belonged, informed A. that if he did not cease to employ non-union labourers, the unions would combine to prevent his business being carried on. He refused to agree with the demand, and B. and the other secretaries thereupon called on the trade union labourers in A.'s employment to strike work, advising them to use no violence or immoderate language. *Held*, that there was no evidence of intimidation within the meaning of the section.—*Curran v. Treleaven*, L.R. [1891] 2 Q.B. 545; 61 L.J. M.C. 9; 65 L.T. 573.
- (vii.) **Q. B. D.**—*Intimidation—Trade Union—Conspiracy and Protection of Property Act, 1875, s. 3, s. 7, sub-s. 1.*—A. and B. were workmen in the same ship-building yard, and members of different trade unions. B.'s union resolved to strike unless A. left his own union and joined their's, and B. informed A. of this without threatening him with violence to

person or property in case of refusal. A. refused, and was dismissed by his employers to avoid a strike. A. stated in evidence that he was afraid, because of what B. had said, that he would lose his work, and would not be able to obtain employment anywhere where the other union outnumbered his own. *Held*, that there was no evidence of intimidation within the meaning of the section.—*Gibson v. Lawson*, L.R. [1891 2 Q.B. 545; 61 L.J. M.C. 9; 65 L.T. 573.

See Evidence, p. 44, ii.

Cruelty to Animals:—

- (i) **Q. B. D.**—*Non-Feasance—Guilty Knowledge of Animal's Condition.*—The appellant, a receiver of large consignments of cattle, had not caused the head ropes of certain cattle, which arrived in port on Saturday, to be removed until the Monday following, and pain was thereby caused to some of the cattle. There was no evidence that he knew of the condition of the cattle. *Held*, that there being no evidence of guilty knowledge on the part of the appellant, or that he wilfully abstained from knowing of the condition of the cattle, a conviction for cruelty could not be sustained.—*Elliott v. Osborn*, 65 L.T. 378.

Deed:—

- (ii) **Ch. D.**—*Construction—Reservation or Regrant—Minerals—Licence to work—Exclusive.*—There may be a grant of an exclusive licence to work minerals, and express words are not needed to exclude the grantor, but there is a *prima facie* presumption against such a licence being exclusive. A. and B., being entitled as tenant for life in possession and tenant for life in remainder, with a power of revocation and new appointment, by deed in 1783, revoked the old uses, and granted and appointed the land to X., saving and reserving to themselves and their heirs full and free liberty to get and carry away the coal thereunder. *Held*, that this ought to be construed not as an exception, but as a regrant of a licence, and that it was not exclusive, as there did not appear on the face of the deed any sufficient ground for rebutting the *prima facie* presumption against such a licence being exclusive.—*Duke of Sutherland v. Heathcote*, L.R. [1891] 3 Ch. 504; 60 L.J. Ch. 841; 65 L.T. 606.

Duress:—

- (iii) **C. A.**—*Stifling Prosecution.*—*See Vol. 16*, p. 44, ii. *Held* (reversing the decision of the Chancery Division), that the burden was on the plaintiff to prove pressure or undue influence; that she had not done so, and that the action was not maintainable.—*McClatchie v. Haslam*, 65 L.T. 691.

Easement:—

- (iv) **Ch. D.**—*Light—Unity of Possession—Severance by Devise.*—A testator, being seised in fee of a house and a piece of land adjoining, devised the house to A. and the land to B. *Held*, that the right to the access of light over the land to the house, passed by the devise of the house, so that a purchaser from B. was not entitled to build so as to obstruct such light.—*Phillips v. Low*, L.R. [1892] 1 Ch. 47; 61 L.J. Ch. 44; 65 L.T. 552.
- (v) **H. L.**—*Scotch Law—Right of Way.*—In order to found a prescriptive right of way, according to Scotch Law, the acts of possession relied on must be of such a character, or done in such circumstances, as to

indicate unequivocally to the proprietor of the servient tenement the fact that the right is asserted and the nature of the right. A mountain path through the X. estate afforded a convenient short cut from one part of the A. estate to another. From 1841 to 1887 the owners of the A. estate had used the path when deer stalking, and for driving back stray sheep, but for no other purpose. The owner of the X. estate had only challenged the use of the path on two occasions, in 1857 and 1882. In 1888 he brought an action of interdict against the future use of the path. The owner of the A. estate claimed a right of way only for purposes connected with sport. *Held*, that he had failed to prove the necessary open and unequivocal assertion of the right of way.—*M'Inroy v. Duke of Athole*, L.R. [1891] A.C. 629.

Elementary Education:—

- (i.) **Q. B. D.**—*Attendance Order—Selection of School—Elementary Education Act, 1876, s. 11.*—Where a complaint is made against a parent for neglecting to send his child to school, the complainant must name a school, and satisfy the Justices that such school is willing to receive the child.—*Thompson v. Rose*, 61 L.J. M.C. 26; 40 W.R. 155.

Evidence:—

- (ii.) **Q. B. D.**—*Intimidation—Conspiracy and Protection of Property Act, 1875, ss. 4, 5, 6, 7.*—In an information under sect. 7 of the Conspiracy and Protection of Property Act, 1875, the accused person is not a competent witness.—*Connor v. Kent*, L.R. [1891] 2 Q.B. 545; 61 L.J. M.C. 9; 65 L.T. 573.

Executor de son Tort:—

- (iii.) **Q. B. D.**—*Creditor recovering Debt from Executor de son Tort—Liability of Creditor.*—A creditor of a deceased, who recovers a debt from an executor *de son tort*, does not thereby become an executor *de son tort*.—*Hursell v. Bird*, 65 L.T. 709.

Foreshore:—

- (iv.) **H. L.**—*Ownership of—Crown—Several Fishery.*—*Prima facie* the Crown is entitled to the whole of the foreshore between high and low water mark; but proof of the ownership of a several fishery over part of the foreshore raises a presumption against the Crown that the freehold of the soil of that part of the foreshore is in the owner of the several fishery.—*Attorney-General v. Emerson*, L.R. [1891] A.C. 649; 65 L.T. 564.

Gaming:—

- (v.) **Q. B. D.**—*Permitting Room to be Used for Betting—Bar of Beerhouse—Betting House Act, s. 3.*—A bookmaker and his clerk were, with the permission of the keeper of a beerhouse, on five consecutive days in the bar of the beerhouse for the purpose of betting, and did bet, with persons resorting thereto. Neither the bookmaker nor his clerk had any interest in the premises, and neither of them occupied any particular place in the bar. *Held*, that the keeper of the beerhouse ought not to be convicted for permitting his premises to be used for the purpose of betting.—*Hornsby v. Raggett*, L.R. [1892] 1 Q.B. 20; 61 L.J. M.C. 24; 40 W.R. 111.

Highway:—

- (i.) **Q. B. D.**—*Repair*—“*Extraordinary Expenses*”—“*Extraordinary Traffic*”—*Highways and Locomotives Amendment Act, 1878, s. 23.*—Expenses were incurred by a highway board in repairing a road, in consequence of stones having been carted for seven years along the road by the appellant. The road was an ordinary country road, used for ordinary light country traffic, and had never been adapted for, or made up to bear, heavier traffic. Stone traffic was a recognised business in the neighbourhood, but was not the ordinary or recognised traffic of the road in question. *Held*, that the magistrates were justified in finding that the expenses and traffic were “extraordinary,” and in making an order that the appellant should pay such expenses, the expressions “extraordinary traffic,” and “extraordinary expenses” meaning traffic and expenses which are extraordinary with reference to the road in question.—*Whitebread v. Sevenoaks Highway Board*, L.R. [1892] 1 Q.B. 8.

Husband and Wife:—

- (ii.) **C. A. & P. D.**—*Divorce—Alimony—Guilty Wife—Matrimonial Causes Act, 1857, ss. 17, 22, 32.*—The Court has jurisdiction to order permanent alimony to be paid to the guilty wife after a decree for judicial separation in a suit instituted by the husband, and has power from time to time to vary the amount of such alimony.—*Goodden v. Goodden*, L.R. [1891] P. 395; L.R. [1892] P. 1; 65 L.T. 542; 40 W.R. 49.
- (iii.) **P. D.**—*Divorce—Husband's Petition—Abortive Trial—Wife's Costs.*—A husband petitioned for divorce on the ground of adultery. He paid into Court a sum of money to meet the wife's costs of trial, as estimated by the registrar, and during the trial, which lasted longer than was expected, he paid in, in compliance with the registrar's order, a further sum to meet the wife's further costs occasioned by the protraction of the trial. The jury disagreed, and were discharged without giving a verdict. *Held*, that the wife was entitled to have her costs taxed, and to have the taxed costs paid, irrespective of any limit.—*Hurley v. Hurley*, L.R. [1891] P. 367; 65 L.T. 353.
- (iv.) **P. D.**—*Divorce—Variation of Settlement—Scotch Marriage.*—The Court has power to entertain a petition for variation of settlements, although the petitioner and the respondent were domiciled in Scotland at the time of the marriage, and although the settlements were made in the Scotch form.—*Forsyth v. Forsyth*, L.R. [1891] P. 363; 65 L.T. 556.
- (v.) **P. D.**—*Separation Agreement—Deed Drawn by Registrar—French Marriage Contract—Variation of.*—A husband and wife, English subjects, were married in Paris, and the marriage contract provided that French law should rule the civil conditions of their marriage. It provided that the wife's parents should pay her an annual sum, and contained various conditions relating to her property acquired then and afterwards. In a suit for divorce, commenced by the wife, the parties agreed to separate on the terms of an agreement signed by them, which were to be embodied in a deed to be settled by the registrar. The agreement provided that the husband should receive an annual sum out of the income provided for the wife by the marriage contract, and should deliver to her all the articles of plate and jewellery belonging to her. The registrar, on the footing that the agreement effected a separation of goods under the French law, prepared a deed

by which the husband relinquished all his rights under the marriage contract. *Held*, that the parties could only be taken to have intended the deed to modify the marriage contract with respect to the income to be paid to the husband and wife, and that the registrar had exceeded his power in dealing with the pecuniary relations of the parties under the other articles of the contract.—*De Ricci v. De Ricci*, L.R. [1891] P. 378.

- (i.) **P. D.—Nullity of Marriage—Consent—Coercion.**—In a suit for a declaration of nullity of marriage the strongest evidence is required to rebut the presumption of consent which arises from the fact that the petitioner went through the marriage ceremony without complaint or apparent reluctance. The fact that the petitioner entered a church and went through the ceremony in consequence of a threat by the respondent that he would shoot himself if she did not do so, is not evidence of coercion sufficient to warrant a declaration of nullity.—*Cooper v. Crane*, L.R. [1891] P. 369; 40 W.R. 127.

See Scotch Law, p. 68, iv.

Inclosure Acts:—

- (ii.) **Q. B. D.—Partition—Not Incident to Inclosure—Effect of Award on Title—Inclosure Act, 1845, s. 105—Inclosure Act, 1848, ss. 13, 14—Commons Act, 1876, s. 33.**—Certain lands were allotted to the predecessors in title of the plaintiffs by an award of partition made under the Inclosure Acts in 1880. The defendants had been in undisturbed possession of the lands since 1851, and had acquired a good title thereto under the Statute of Limitations. The award was not made under any inclosure scheme. None of the parties to the partition proceedings had any interest in the lands, which were included in their application, and dealt with in the award, by mistake. *Held*, that the award was not conclusive as to the title of the allottee, and had been made without jurisdiction, not having been made on the application of persons interested in the lands, and that the plaintiffs, therefore, could not recover the lands from the defendants.—*Jacomb v. Turner*, L.R. [1892] 1 Q.B. 47.

Indian Law:—

- (iii.) **P. C.—Carrier—Liability.**—The liability of a common carrier of goods for hire in India is governed by English common law, and is not affected by the Indian Contract Act, 1872.—*Irrawaddy Flotilla Co. v. Bugwandass*, 65 L.T. 596.

Industrial Society:—

- (iv.) **Q. B. D.—Application of Profits—"Lawful Purpose."**—The rules of an industrial society provided that the profits of the society's business should be applied "either to increase the capital reserve fund or business of the society, or to any lawful purpose; and the remainder, less any grant that may be made for educational purposes," was to be divided among the members. *Held*, that "lawful purposes" meant purposes connected with the business, and that a subscription to a strike fund was not authorised by the rules.—*Warburton v. Huddersfield Industrial Society*, 61 L.J. Q.B. 25.
- (v.) **Q. B. D.—Liquidation—Invalid Loans—Charge on Assets—Rule of Society—Banking—Industrial and Provident Societies Act, 1876.**—An industrial society, in 1887, passed a rule which purported to secure certain invalid loans on deposit, made prior to 1887, as a charge on the assets. *Held*, that the rule was invalid, and did not entitle the loan-

holders to claim in the liquidation of the society in priority to the trade creditors; that the loans on deposit were in reality banking transactions, and as such prohibited by the Act above mentioned.—*In re Bottomgate Industrial Society*, 65 L.T. 712; 40 W.R. 139.

Infant:—

- (i.) **H. L.—Custody of—Illegitimate Child—Rights of Mother.**—In determining who is to have the custody of and control over an illegitimate child, the Court, in exercising its jurisdiction with a view to the benefit of the child, will primarily consider the wishes of the mother. The authorities do not establish the proposition that the legal rights of the mother of an illegitimate child to its custody are the same as those of the father of a legitimate child. Decision of C.A. (*see* Vol. 16, p. 46, i.) affirmed.—*Barnardo v. McHugh*, L.R. [1891] A.C. 388; 65 L.T. 423 40 W.R. 97.
- (ii.) **C. A.—Ward of Court—Marriage after Twenty-one—Undertaking of Husband—Jurisdiction.**—Permission was obtained by a suitor, upon his undertaking to abide by the orders of the Court, to pay his addresses to a ward of Court, with a view to proposals being made to the Court for marriage. The ward waited till she came of age, and then settled her property in favour of the proposed husband. *Held*, that the undertaking was only intended to last so long as the ward was under the control of the Court, and that there was no jurisdiction to interfere with the marriage or to determine the form of the settlement.—*Bolton v. Bolton*, L.R. [1891] 3 Ch. 270; 60 L.J. Ch. 689; 65 L.T. 698; 40 W.R. 145.

Insanitary Dwellings:—

- (iii.) **C. A.—Demolition—Compensation—Liverpool Sanitary Amendment Act, 1864, s. 3, 5, 13—Local Government Provisional Orders Confirmation Act, 1879.**—Decision of Q. B. D. (*see* Vol. 16, p. 121, iv.) affirmed.—*Gough v. Corporation of Liverpool*, 65 L.T. 512.

Interest:—

- (iv.) **Ch. D.—Notice Claiming Interest—3 & 4 Will. IV., c. 42, s. 38—Evidence of Promise to Pay Interest.**—A tradesman delivered to his customer an account for goods supplied, which contained various items, running over a considerable period, and on which was printed a statement that interest would be charged on the amount of the account after one year's credit. The customer replied that he was not aware that he owed so large a sum as stated, but would be able to pay a considerable sum on account in a short time. In an action to administer the customer's estate, the tradesman claimed the whole amount of the account so delivered, which included charges for interest on the balance due at the end of each year, after allowing two years' credit. *Held*, that the fact that the customer made no objection to the account delivered was not evidence of a promise to pay the interest charged. *Held*, also, that the general intimation that interest would be charged after one year's credit would not be considered as referring to each item in the account, and was not a sufficient claim of interest.—*Williams v. French*, 61 L.J. Ch. 22; 65 L.T. 453.
- (v.) **C. A.—Railway Companies—Traffic Agreement—Monthly Balances—Verification of Accounts—3 & 4 Will., c. 42, s. 28.**—Two railway companies had entered into an agreement for pooling certain traffic receipts, by which, as altered by a subsequent award, it was provided that monthly accounts should be exchanged between the companies and verified, and that the balances appearing due from time to time

should be paid within a fixed period. An action was brought on the construction of the agreement, and the accounts were referred to an official referee. He found unpaid balances due to the plaintiffs, and allowed interest on such balances. *Held*, that there was no sum due, and therefore no interest payable, until the accounts had been verified, and that, if there was delay in the verification, as there was in this case on the part of the plaintiffs, the party causing such delay could not recover interest. Decision of Ch. D. (*see* Vol. 16, p. 122, i.) varied.—*L.C. & D.R. v. S.E.R.*, 40 W.R. 194.

Justices :—

- (i.) **Q. B. D.**—*Jurisdiction—Time—Computation*.—In computing the one calendar month within which complaint must be made under sect. 14 of 12 & 13 Vict., c. 92, the day on which the offence was committed is not to be included.—*Radcliffe v. Bartholomew*, 65 L.T. 677; 40 W.R. 63.

Landlord and Tenant :—

- (ii.) **C. A.**—*Covenant for Quiet Enjoyment*.—The defendant leased a mine to the P. company, and leased an adjoining mine to the plaintiffs, with a covenant for quiet enjoyment, without any interruption by the defendant or persons claiming under him. The P. company, while properly working their mine, tapped a "feeder," whereby a large body of underground water, the existence of which was unsuspected, and the nature of which was uncertain, flooded their mine, and thence entered the plaintiffs' mine, and caused damage. *Held*, that the damage, not having been caused by any direct act of interruption, or by any act the consequences of which were, or ought to have been, foreseen by the defendant at the time when the plaintiffs' lease was granted, was not a breach of the covenant for quiet enjoyment.—*Harrison, Ainslie & Co. v. Lord Muncaster*, L.R. [1891] 2 Q.B. 680; 65 L.T. 481; 40 W.R. 102.

See Contract, p. 41, ii.

Libel :—

- (iii.) **Q. B. D.**—*Privilege—Judicial Proceedings—Written Objections to Bill of Costs*.—No action will lie against a solicitor for defamatory words contained in written objections lodged by him upon taxation of another solicitor's bill of costs.—*Pedley v. Morris*, 61 L.J. Q.B. 21; 66 L.T. 526; 40 W.R. 42.

Licensing :—

- (iv.) **Q. B. D.**—*Beerhouse—Refusal to Renew Licence—Ground not Stated in Objection—Quarter Sessions—Refusal on Ground Stated in Objection—Licensing Act, 1872, s. 42—Wine and Beerhouse Act, 1869, ss. 8, 19*.—W. was tenant of a beerhouse which had been licensed before, and continuously since, 1869. At the general licensing meeting, W. having received no notice of objection to renewal of the licence, the justices ordered notice of objection to be served on him, and such notice was served, the grounds being that persons had been found drunk and disorderly on the premises, and that persons of bad character frequented the house. At the adjourned meeting renewal of the licence was refused on the ground that W. had not given satisfactory evidence of character, no notice of that ground of objection having been given. On appeal to quarter sessions the renewal was refused on the ground that the house was frequented by persons of bad character. *Held*, that the quarter sessions had jurisdiction to refuse the renewal of the licence on that ground, as it was stated in the original notice of objection, although the justices had not decided the case on that ground.—*Whiffen v. Maidstone Justices*, 65 L.T. 413.

- (i.) **C. A.**—*Renewal—Notice of Opposition—Service of—Licensing Act, 1872, s. 42.*—Upon an application for the renewal of a licence, it appeared that written notice of intention to oppose the renewal was handed to a boy at the applicant's licensed house, and that the notice came to the hands of the applicant more than seven days before the annual licensing meeting. *Held*, that the service was sufficient.—*E. p. Portingell, L.R. [1892] 1 Q.B. 15; 61 L.J. M.C. 1; 65 L.T. 603; 40 W.R. 102.*
- (ii.) **Q. B. D.**—*Permitting Drunkenness.*—A licensed person who sells liquor on his premises to a drunken person is liable to be convicted under the Licensing Act, 1872, sect. 13, of the offence of permitting drunkenness to take place on his premises.—*Edmunds v. James, L.R. [1892] 1 Q.B. 18; 65 L.T. 675; 40 W.R. 140.*

Limitations:—

- (iii.) **N. P.**—*Promissory Note—Assignment—Part Payment to First Holder—Acknowledgment.*—Part payments of principal and interest by the maker of a promissory note to the first holder, made after such holder had, without the knowledge of the maker of the note, assigned the same, are not acknowledgments of the debt to the assignee of the note because they are inconsistent with his title. Such payments are therefore no bar to the Statute of Limitations, if pleaded by the maker of the note.—*Stamford, Spalding and Boston Banking Co. v. Smith, 40 W.R. 48.*

Local Government:—

- (iv.) **Q. B. D.**—*Coroner—Appointment of—Franchise Coroners—Local Government Act, 1888, ss. 3, 5, 48, 59, 117.*—Though the quarter sessions business of justices in respect of coroners and the right of selection to the office of coroner, previously vested in the freeholders, is now transferred to the County Council, the appointment of franchise coroners by the Crown or other person in whom such power of appointment was vested before the Local Government Act, 1888, is not affected by the Act.—*E. p. London County Council, L.R. [1892] 2 Q.B. 33; 61 L.J. Q.B. 27; 65 L.T. 614.*
- (v.) **Ch. D.**—*Drainage—Right to Drain into Sewer—Public Health Act, 1875, ss. 15, 17, 21, 157.*—Sect. 17 of the Public Health Act does not affect the right conferred by sect. 21 upon the owner or occupier of premises within the district of a local board, to drain into the existing sewers of the board, and the board must see that the sewers are so arranged that they do not contravene sect. 17. The plaintiffs, who owned premises in the defendants' district, had, eight years before the action, connected a drain with the defendants' sewer, which was formerly an open watercourse, and still emptied into a natural stream. Proceedings having been taken against the defendants to restrain the fouling of the stream, they gave notice of their intention to cut off the plaintiffs' drain. *Held*, that the plaintiffs had an absolute right to drain into the sewer, that the defendants were bound to see that the sewage was purified before entering the stream, and that they must be restrained from cutting off the plaintiffs' drain.—*Ainley v. Kirkheaton Local Board, 60 L.J. Ch. 734.*
- (vi.) **Ch. D.**—*Drainage—Nuisance—Injunction.*—The defendants had sanctioned the drainage of certain houses by means of cesspools with overflow pipes connecting with main pipes. The sewage from the main pipes entered a watercourse and caused a nuisance in the district of the relators. The relators had themselves power under the Public Health Act to enforce the abatement of the nuisance, but sued for an injunction

against the vestry to restrain the nuisance. *Held*, that the defendants, having sanctioned the system of drainage, could not cut off the communications with the main pipes. *Held*, also, that an injunction ought not to be granted against a local board on the ground that they are not properly exercising their powers or performing their duties.—*Attorney-General v. Vestry of St. James and St. John, Clerkenwell*, L.R. [1891] 3 Ch. 527; 60 L.J. Ch. 788; 65 L.T. 312; 40 W.R. 185.

- (i.) **Q. B. D.**—*Lunatic Asylum—Annual Rent Paid by Borough—Transfer of Liability*.—The county of Salop, the county of M., and the borough of W. owned a lunatic asylum. The boroughs of O., B. and L., in the county of Salop, were afterwards admitted to the use of the asylum, according to agreements which provided that these three boroughs should pay an annual rent to the treasurer of the asylum for the privilege of using it. Each of these boroughs was, when the Local Government Act, 1888, came into operation, a quarter sessions borough with a population of less than 10,000. *Held*, that the liability of the boroughs under the agreements was transferred to the county council of Salop, subject to the contracts which had been entered into between these boroughs and the visiting justices of the asylum.—*In re County Council of Salop*, 65 L.T. 416.
- (ii.) **C. A.**—*Street Improvement—Charge on Premises—Sale to Satisfy Charge—Free from Covenants—Public Health Act, 1875, ss. 4, 150, 257, 276*.—Decision of Ch. D. (*see* Vol. 15, p. 123, ii.) reversed.—*Guardians of Tending Union v. Downton*, L.R. [1891] 3 Ch. 265; 65 L.T. 434; 40 W.R. 145
See Nuisance, p. 54, iv.

Lunatic:—

- (iii.) **Q. B. D.**—*Estate Under £200—County Court Judge—Stock at Bank—Lunacy Act, 1890, ss. 132, 133*.—Where the estate of a lunatic is under £200, and the county court Judge makes an order directing some person to take possession of and realize the lunatic's property, he has no jurisdiction to order that stock standing at the bank in the name of the lunatic should be transferred to such person.—*In re Noyce*, L.R. [1892] 1 Q.B. 97; 65 L.T. 676; 40 W.R. 110.
- (iv.) **C. A.**—*Petition for Inquiry—Pending Inquiry—Medical Examination*.—Pending an inquiry before a master in lunacy into the state of mind of an alleged lunatic, the Court will not order the alleged lunatic to submit against his will to a medical examination, unless the master informs the Court that such an order is necessary to enable him to come to a decision upon the subject.—*In re Bathe*, L.R. [1891] 3 Ch. 274; 60 L.J. Ch. 766; 65 L.T. 205; 40 W.R. 9.

Married Woman:—

- (v.) **C. A.**—*Contract—Separate Estate—Presumption—Insignificant Estate*.—A married woman covenanted to pay £400, her only free separate estate at that time being a sum of about £4. *Held*, that there was no presumption that the contract was entered into with respect to, and to bind, such small separate estate.—*Braunstein v. Lewis*, 65 L.T. 449.
- (vi.) **C. A.**—*Judgment Against—Separate Property—Costs—Costs due to Married Women—Set-off*.—Judgment was recovered against a married woman with costs, execution being limited to her separate property not subject to restraint on anticipation. Certain costs were due to her personally from the plaintiffs in respect of a certain proceeding in the action. *Held*, that the costs recovered by the plaintiffs could be set off against the costs so due to the married woman personally.—*Pelton Brothers v. Harrison* [No. 2], L.R. [1892] 1 Q.B. 118.

(i.) **Ch. D.—Restraint on Anticipation—Removal by Court—Conveyancing, &c., Act, 1881, s. 39.**—By the settlement on the marriage of M., an infant, which was confirmed by her on coming of age, property belonging to her was settled on her for life with a restraint on anticipation. The settlement contained a covenant to settle after-acquired property. M. afterwards became entitled to property under a will. Believing that it was not bound by the settlement, she joined her husband in mortgaging it to R. for a loan at 6 per cent. interest, and to F. for a loan at 7 per cent. interest. The loans were applied partly in the payment of pressing debts of the husband, and partly in the purchase from mortgagees of the husband of policies on his life, which were intended to form a fund to repay to M. the sum so raised. *Held*, on the application of M., and on proof that the husband was earning enough to maintain his wife and family, and on R. and F. undertaking to reduce their interest to 5 per cent., and not to enforce payment of principle or interest during the life of M. without the leave of the Court, that the restraint on anticipation should be released so as to allow valid mortgages to be executed to secure the advances from R. and F., the mortgages to include the policies above mentioned, and certain other policies to be effected by R. and F., the interest of the settled property to be applied in payment of the premiums, and as far as it would go in payment of the interest, and the release to operate only until the Court should otherwise order.—*In re Milner's Settlement*, L.R. [1891] 3 Ch. 547; 15 L.T. 310; 40 W.R. 76.

(ii.) **Q. B. D.—Separate Estate—Contract.**—A., a married woman, was entitled to an income of £300 a year, payable to her for her separate use without power of anticipation. She lived rent free in a house belonging to her brother, which on two occasions she let, receiving the rent. Her income was received by her trustee, and paid over to her on receipt, generally every month. She was usually in debt to tradesmen, and paid over the greater part of each instalment of income on account of the tradesmen's bills. She was sued for the balance of one of such bills, consisting of a number of small items for goods supplied from time to time. *Held*, by Smith, J., that there was no evidence to support the finding of the County Court Judge that on each date of the orders given by A. she was possessed of separate estate of the requisite character whereon to found a contract, and that therefore judgment ought not to be given for the whole amount; but that the plaintiff should have liberty to go to a new trial as to the exact position of A. on each of the dates on which she contracted. *Held*, by Grantham, J., that there was evidence to shew that A. had separate estate, arising from the instalments of income paid to her, at the times she entered into these contracts, whether each item was to be taken as a separate contract, or whether the whole account was to be taken generally, and that she was therefore liable for the whole amount.—*Everett v. Paxton*, 65 L.T. 383.

See Practice, p. 59, i.

Master and Servant:—

(iii.) **H. L.—Employers Liability Act, 1880—Risk Incurred Voluntarily.**—When a workman engaged in an employment, not in itself dangerous, is exposed to danger arising from an operation in another department over which he has no control—the danger being created or enhanced by the negligence of the employer—the mere fact that he undertakes or continues in such employment with full knowledge and understanding of the danger is not conclusive to make the maxim "*volenti non fit injuria*" applicable in case of injury. The question whether he has

undertaken the risk so as to make the maxim apply is one of fact and not of law. The plaintiff was working near a crane which was worked by men in the service of his employers, and which lifted stones, and sometimes swung them over his head without warning. He was aware of the danger, and had been thus employed for some time. A stone having fallen and injured him. *held*, that the fact that he continued in his employment with full knowledge of the risk caused by the systematic neglect to give warning did not preclude him from recovering; that the evidence would justify a finding that he did not voluntarily undertake the risk of injury, and that the maxim, "*volenti non fit injuria*," did not apply.—*Smith v. Baker*, L.R. [1891] A.C. 325; 60 L.J. Q.B. 683; 65 L.T. 487.

- (i.) **Q. B. D.**—*Negligence—Fellow-workman*—"Person to whose Orders or Directions the Workman is bound to Conform"—*Employers' Liability Act*, 1880, s. 1, sub-ss. 2, 3.—D., a joiner, was employed by the defendants to construct a lift. The plaintiff was engaged to assist D. In accordance with D.'s directions the plaintiff stood on a plank across the shaft of the lift, and D. negligently started the lift, whereby the plaintiff was injured. *Held*, that D. was not a person to whose order or direction the plaintiff was bound to conform, and that the plaintiff's injury was not caused by conforming to D.'s orders, but by another act of negligence, and that the defendants were not liable.—*Wild v. Waygood*, 65 L.T. 710.
- (ii.) **C. A.**—*Workman—Employers and Workmen Act*, 1875, s. 10.—Decision of Q. B. D. (see Vol. 16, p. 127, i.) reversed.—*Bound v. Lawrence*, 61 L.J. M.C. 21; 40 W.R. 1.
See Ship, p. 66, i.

Metropolitan Building Acts:—

- (iii.) **Q. B. D.**—*Roof—Incombustible Materials—Metropolitan Building Act*, 1855, s. 19, sub-sec. 1.—The roof of a building was covered externally with materials consisting of woven iron wire coated with a substance which could ignite and burn away without injuring the iron wire. *Held*, that it was not covered with "incombustible materials."—*Payne v. Wright*, L.R. [1892] 1 Q.B. 104; 61 L.J. M.C. 7; 65 L.T. 612; 40 W.R. 191.
- (iv.) **C. A.**—*Surveyor's Fee—Separate Sets of Chambers*.—Separate sets of chambers under one roof, intended to be separately occupied, and having no means of communication with each other, except by a common staircase, are not separate buildings within the Metropolitan Building Act, 1855, so as to entitle the district surveyor to charge a separate fee in respect of each of them.—*Moir v. Williams*, 40 W.R. 69.

Metropolis Management:—

- (v.) **Q. B. D.**—*New Street—Paving Expenses—Metropolis Management Act*, 1855, s. 250; 1862, s. 112.—A footpath adjoining a road had been tar-paved in 1873 by the public authority at the expense of the rates. In 1890, the authority declared the whole roadway a "new street," and proceeded to pave the same, and to apportion the expenses among the frontagers. One of them objected that the footpath was not a "new street." The magistrate found that the tar-paving was temporary work. *Held*, that the footpath was a "new street," and that the public authority was entitled to treat the roadway and the footpath as a whole.—*Wilson v. Vestry of St. Giles', Camberwell*, L.R. [1892] 1 Q.B. 1; 41 L.J. M.C. 8; 40 W.R. 41.

- (i.) **C. A.**—*Paving Expenses—Summons for Recovery of—Jurisdiction of Magistrate—Enquiry into Amount—Metropolis Management Acts, 1855, ss. 105, 225, 226; 1862, s. 77.*—When proceedings are taken before a magistrate against the owner of a house in a street to recover the apportioned amount of the expenses of paving the street, the magistrate is bound to enquire whether the whole of the expenses have been incurred in respect of "paving" works; and ought to receive evidence, if tendered, to show that part of such expenses was in respect of works other than "paving."—*Reg. v. Marsham*, 40 W.R. 84.
- (ii.) **Q. B. D.**—*Place for Dancing and Music—Not Licensed—Protection from Fire—Certificate—Metropolis Management, &c., Acts Amendment Act, 1878, s. 12.*—When a summons is taken out against the proprietor of a building in the metropolis for keeping the same open for music without having a certificate that it was, on its completion, in accordance with the regulations as to protection from fire, it is no answer to the charge to prove that the building has not been licensed "to be kept open for public dancing, music, or other public entertainment of the like kind." The magistrate ought to decide whether the building is one which requires a licence.—*Reg. v. Hannay*, L.R. [1891] 2 Q.B. 709; 60 L.J. M.C. 167; 40 W.R. 14.

Mine:—

- (iii.) **C. A.**—*Wages—Payment by Weight—Deduction—Coal Mines Regulation Act, 1887, s. 12, sub.s. 1.*—Decision of Q. B. D. (*see* Vol. 16, p. 87, v.) affirmed.—*Brace v. Abercrom Colliery Co.*, L.R. [1891] 2 Q.B. 699; 60 L.J. Q.B. 706; 65 L.T. 694; 40 W.R. 5.

Mortgage:—

- (iv.) **C. A.**—*Costs—Redemption—Wrongful Claims by Mortgages.*—Where a first mortgagee refuses the offer of the second mortgagee to redeem, on the ground that he is entitled to consolidate another mortgage, and in a redemption action by such second mortgagee it is held that the claim to consolidate cannot be sustained, the first mortgagee will be liable for the plaintiff's costs, as the litigation was caused by his refusal of the offer to redeem.—*Squire v. Pardoe*, 40 W.R. 100.
- (v.) **Ch. D.**—*Foreclosure—Receipt of Rents after Date of Redemption.*—When a mortgagee receives rents after default is made in payment of principal and interest on the day fixed for redemption, but before the affidavit of such default is made, the order for final foreclosure will be made without further account.—*National Permanent Mutual Benefit Building Society v. Raper*, L.R. [1892] 1 Ch. 54; 65 L.T. 668; 40 W.R. 73.
- (vi.) **Ch. D.**—*Reversionary Interest—Fund in Court—Payment out—Six Months' Interest in Lieu of Notice.*—A. mortgaged his reversionary interest in a fund in Court expectant on the death of an annuitant, and afterwards settled his equity of redemption. On the death of the annuitant, the trustees of the settlement petitioned for payment out to them of so much of the fund as remained after payment of the mortgage debt. *Held*, that as the mortgagee had taken no steps to compel payment, he was entitled to have six months' interest (from the date of service of the petition on him) in lieu of notice.—*Smith v. Smith*, L.R. [1891] 3 Ch. 550; 60 L.J. Ch. 694; 65 L.T. 334; 40 W.R. 32.

- (i.) **C. A.—Tender—Disputed Amount.**—A mortgagor tendered the balance appearing due according to an account made out by him. The mortgagee refused the tender, claiming a larger amount. The mortgagor brought an action to redeem. *Held*, that the tender was good, as it imposed no conditions, and that the mortgagor was entitled to accounts to shew whether it was sufficient, reserving further consideration and costs in case it should prove sufficient, an ordinary redemption decree to be made if it should prove insufficient.—*Greenwood v. Sutcliffe*, L.R. [1892] 1 Ch. 1; 40 W.R. 214.

Municipal Election:—

- (ii.) **Q. B. D.—Candidate Acting as Returning Officer—Disqualification—Remedy—Municipal Corporations Act, 1882, ss. 87 (c) (d), 225.**—The mayor of a borough was a candidate for the office of alderman of the borough. At the election he presided and voted for himself, and the votes being equal, gave a casting vote for himself, and declared himself elected. *Held*, that the validity of the election ought to be determined on an election petition, and not by proceedings in the nature of *quo warranto*.—*Reg. v. Morton*, L.R. [1892] 1 Q.B. 39; 61 L.J. Q.B. 39; 65 L.T. 611; 40 W.R. 109.

Negligence:—

- (iii.) **Q. B. D.—Non-feasance—Obligation—Evidence of—Custom.**—In an action for damages for personal injuries caused by the non-performance of an operation which the defendants were not bound either by statute or express contract to perform, *held*, that the fact that such operation was usually performed by the defendants' servants was no evidence of any contractual duty on the part of the defendants to perform it, and imposed no liability on them for the non-performance thereof.—*Loader v. London and India Docks Joint Committee*, 65 L.T. 674.

Nuisance:—

- (iv.) **Ch. D.—Pollution of Stream—Sanitary Authority—Public Health Act, 1875, ss. 18, 17, 21, 29, 332, 333.**—The provisions of the Public Health Act, that all sewers within the district of a local authority "shall vest in and be under the control of such authority," does not make the sewers the absolute property of the local authority, so as to place such authority for all intents and purposes in the same position as if they were private owners of the sewers. Where a ditch running along the street of a town had been used as a sewer since 1853, *held*, that it was almost inevitable that some prescriptive rights of drainage should have been acquired with which the local authority could not interfere, and that such authority could not physically disconnect the house drains from the ditch, and were not liable for the nuisance caused by the pollution of the ditch.—*Ogilvie v. Blything Sanitary Authority*, 65 L.T. 338.

Partnership:—

- (v.) **Ch. D.—Determination of Articles—Continuance of Partnership—Operation of Articles.**—Where a partnership is continued beyond the term fixed by the articles, the articles are still applicable, except where they are inconsistent with a partnership at will. A clause in articles of partnership between A. and B., providing that A. should within three months after the expiration or determination of the partnership by effluxion of time, have the option of purchasing B's share, is not inconsistent with a partnership at will.—*Daw v. Herring*, 61 L.J. Ch. 5; 40 W.R. 61.

Patent:—

- (i.) **C. A.—Agreement for Share in—Registration—Patents, &c., Act, 1883, s. 23.**—Decision of Ch. D. (*see* Vol. 17, p. 21, ii.) affirmed.—*Stewart v. Casey*, 40 W.R. 180.
- (ii.) **C. A.—Infringement—Particulars of Objections—Patents, &c., Act, 1883, s. 29.**—The defendant to an action for infringement, in his particulars of objections, alleged publication by seventeen prior specifications, relying in some cases on the whole specification, and in other cases giving pages and lines, and pointing out the claims in the plaintiffs' specifications to which the anticipations referred. The plaintiffs applied for further and better particulars, asking that the defendant should be ordered to state what, in the case of each specification, was the nature of the anticipation on which he relied, and in what part of such specification such alleged anticipation was to be found. *Held*, that the particulars already given were all that could be reasonably required under the circumstances.—*Nettlefolds v. Reynolds*, 65 L.T. 699.
- (iii.) **P. C.—Prolongation—Non-user—Presumption of Non-utility Rebutted.**—Where an invention has not been brought into use during the term of the letters patent, but such non-user is satisfactorily accounted for, and the invention is one of great merit, an extension may be granted.—*Southby's Patent*, L.R. [1891] A.C. 432.
- (iv.) **P. C.—Prolongation—Time for Filing Petition.**—Where a petition for prolongation of a patent was not presented six months before the expiry of the patent, which was granted in 1877, *held*, that under both 5 & 6 Will. IV., c. 83, and 2 & 3 Vict., c. 67, the power to prolong the patent was excluded.—*In re Marshall's Patent*, L.R. [1891] A.C. 430.
- (v.) **C. A.—Validity—Provisional and Complete Specifications—Variation—Patents, &c., Act, 1883, s. 5, sub-s. 3, s. 26.**—The provisional specification must describe the true nature of the invention, and the invention there described must be the same as that claimed in the complete specification. The patentee of an invention for tapping beer-barrels, and preventing waste and leakage, described his invention in the provisional specification as a plug screwed into the barrel end, with a valve, spring, and guide. The complete specification added a description of a strainer, which was proved to be the only thing novel or useful in the invention. *Held*, that the provisional specification did not describe the true nature of the invention, and that the patent was bad.—*Nuttall v. Hargreaves*, L.R. [1892] 1 Ch. 23; 65 L.T. 597; 40 W.R. 200.

Poor Law:—

- (vi.) **Q. B. D.—Rating—Advertising Hoarding—Advertising Stations (Rating) Act, 1889, s. 3.**—The appellant was erecting buildings under a contract. Hoardings were erected round the land resting on highways, a licence having been obtained from the commissioners of sewers in whom the highways were vested. He had the right, under his contract, to use the hoardings for advertisements, and he sublet them for the purpose. *Held*, that he was liable to be rated in respect of the hoardings.—*Chappell v. Overseers of St. Botolph*, 65 L.T. 580; 40 W.R. 192.
- (vii.) **Q. B. D.—Rating—Recovery of Arrears—Mistake of Overseers.**—A railway occupying land in a parish were correctly entered in the rate book at the full value of the land, but the overseers, incorrectly believing that they were entitled to be rated for the purposes of the Public Libraries Act, 1855, at one-third of such value, for four successive years sent them demand notes for one-third only of the full

library rate. *Held*, that the unpaid two-thirds of such library rate might be recovered as arrears, and that the overseers were not estopped from so recovering it by the incorrect demand notes.—*Reg. v. Blenkinsop*, L.R. [1892] 1 Q.B. 43.

- (i.) **Q. B. D.**—*Rating—Metropolitan Assessment—Valuation (Metropolis) Act, 1869, ss. 6, 14, 17, 20, 44, 45, 47—Alteration in Individual Assessment—Totals.*—The total amount is to remain as assessed in the valuation list, although there may have been alterations in some of the individual assessments. The list cannot be re-opened by shewing that the particular rating of an individual ratepayer has been altered on appeal.—*Reg. v. Guardians of Woolwich Union*, L.R. [1891] 2 Q.B. 712; 60 L.J. Q.B. 665; 65 L.T. 460; 40 W.R. 155.

Practice :—

- (ii.) **Ch. D.**—*Affidavit—Interlineation—Jurisdiction of Practice Master—R.S.C., 1883, O. liv., r. 12; O. lxi., r. 2.*—An affidavit, sworn in support of an application to the Chancery Division for the production of a *cestui qui vie*, contained an interlineation which was not initialed by the notary before whom it was sworn. It was sent to a practice master of the Queen's Bench Division, who initialed the interlineation, and the affidavit was filed. *Held*, that the practice master had no jurisdiction in matters before the Chancery Division, and that the affidavit ought not to have been filed without the order of the Court. *Held*, also, that the affidavit ought to be allowed to remain on the file, and to be deemed to have been filed on the day on which it was filed.—*In re Cloake*, 65 L.T. 455; 40 W.R. 74.
- (iii.) **C. A.**—*Appeal—Bankruptcy—Withdrawal.*—A respondent refused the offer of an appellant to withdraw his appeal from a registrar in bankruptcy and pay the costs incurred up to date. On the appeal coming on for hearing the Court refused to allow it to be withdrawn, but ordered it to be dismissed in the ordinary course.—*E. p. Marden*; *in re Downing*, 65 L.T. 665.
- (iv.) **C. A.**—*Appeal—Criminal Cause—Company—Default in forwarding List to Registrar—Mandamus.*—A magistrate having refused to issue a summons against a company for default in forwarding a list of its members to the registrar, the Queen's Bench Division refused to grant a mandamus directing him to hear and determine the application for the summons. *Held*, that the decision was a judgment in a "criminal cause or matter," and that no appeal would lie.—*Reg. v. Tyler*, L.R. [1891] 2 Q.B. 588; 65 L.T. 662.
- (v.) **H. L.**—*Appeal—Habeas Corpus.*—Decision of C. A. (see Vol. 16, p. 54, ii.) affirmed.—*Barnardo v. McHugh*, L.R. [1891] A.C. 388; 65 L.T. 423; 40 W.R. 97.
- (vi.) **Q. B. D.**—*Appeal—Libel—Newspaper—Order allowing Criminal Proceedings—Law of Libel Amendment Act, 1888, s. 8.*—There is no appeal from the order of a Judge allowing a criminal prosecution to be commenced against the person responsible for the publication of a newspaper, for a libel published therein.—*E. p. Pulbrook*, L.R. [1892] 1 Q.B. 86; 40 W.R. 175.
- (vii.) **Q. B. D.**—*Arbitration—Commission to Examine Witnesses—Arbitration Act, 1889, s. 1—R.S.C., 1883, O. xxxvii., r. 5.*—When parties have agreed to refer a dispute to arbitration, no action having been commenced with respect to such dispute, there is no jurisdiction to order the issue of a commission to examine witnesses in the matter referred to arbitration.—*In re Shaw and Ronaldson*, L.R. [1892] 1 Q.B. 91.

- (i.) **Ch. D.**—*Company—Winding-up—Summoning Witness*.—Where a contributory desires to summon a witness before a special examiner for examination in a winding-up, his proper course is to do so by a chief clerk's summons, and not by subpoena.—*In re Westmoreland Green and Blue Slate Co.*, 40 W.B. 171.
- (ii.) **Ch. D.**—*Contempt of Court—Motion for Committal—Substituted Service*.—When every reasonable effort has been made unsuccessfully to effect personal service of notice of motion to commit for contempt of Court, an order for substituted service may be made, and notice of the application for such order need not be given to the solicitor upon the record of the alleged contemnor. On the hearing of the motion the alleged contemnor cannot, as a preliminary objection, raise the point that short notice of motion ought not to have been served.—*Mander v. Falcke*, 61 L.J. Ch. 3; 65 L.T. 454.
- (iii.) **C. A.**—*Costs—Discretion of Judge—Judicature Act, 1873, s. 47—R.S.C., 1883, O. lrv., r. 1*.—The plaintiff sued the defendants, M. and A., the latter defendant being a builder employed by M., for an injunction to compel the removal of a certain wall, and for damages for obstruction of light, and for injury done to the plaintiff's house by the negligent conduct of the defendants' works. The defendant M. took out a summons to stay the action, offering to pull down the wall, to submit to a perpetual injunction, to consent to an enquiry as to damages, and to pay the costs. The plaintiff refused, but M. pulled down the wall. At the trial the judge awarded 40s. damages against M., for damage before the wall was pulled down, but without costs; and gave judgment for the defendant with costs on the question of structural damage. *Held*, on appeal, that the liability to pay the 40s. ought to be joint and several. *Held*, further, that the judge had a discretion as to costs, and that there was no appeal from his discretion. *Held*, also, that there had been no structural damage.—*Florence v. Mallinson*, 65 L.T. 354.
- (iv.) **Ch. D.**—*Costs—Motion to Rectify Register of Trade Marks—Discontinuance—R.S.C., 1883, O. xxvi., r. 1*.—Where the registered proprietor of a trade mark has been served with an originating notice of motion to remove his mark from the register, and subsequently with notice of the discontinuance of the motion, he is entitled, notwithstanding the notice of discontinuance, to apply in Court for the costs as of an abandoned motion.—*In re Dyson's Trade Mark*, 65 L.T. 488.
- (v.) **P. D.**—*Costs—Refreshers—R.S.C., 1883, O. lrv., r. 27, sub-r. 48—Discretion of Taxing Master*.—A trial lasted two hours and a-quarter on the first day, and five hours and a-half on the second day. On taxation between party and party the master allowed refresher fees in respect of the last two hours and three-quarters on the second day. *Held*, that he had a discretion to allow some refresher fee for any time during which the trial was substantially prolonged beyond five hours.—*The Courier*, L.B. [1891] P. 355.
- (vi.) **Q. B. D.**—*Costs—Trespass—Damage and Injunction—County Courts Act, 1888, s. 116*.—In an action of trespass, the main question being one of title to land, the plaintiffs claimed an injunction and damages. The jury found for the plaintiffs with 40s. damages. The Judge gave judgment for them, and granted the injunction, but made no order as to costs. *Held*, that the plaintiffs were not entitled to costs.—*St. John's College, Cambridge, v. Pierrepont*, 61 L.J. Q.B. 19.
- (vii.) **Ch. D.**—*Discovery—Ejectment*.—The defendants to an action of ejectment stated, in their defence, that they were in possession "by themselves or their tenants." The plaintiffs interrogated them as to the names of the tenants, the nature of their tenancies, and the dates

of their creation. *Held*, that the interrogatory did not require the defendants to disclose what related solely to their own title, and that the plaintiffs were entitled to information as to the names of the tenants, and the dates and duration of their tenancies, but not to further information as to their nature.—*Eyre v. Rodgers*, 40 W.R. 137.

- (i.) **Q. B. D.**—*Discovery—Libel—Newspaper—Extent of Circulation.*—In an action for libel against a newspaper, the defendants were interrogated as to the number of copies of the issue containing the alleged libel which were printed and circulated. *Held*, that an answer admitting a “large, extensive, and general circulation” was insufficient; and that the defendants must answer approximately as to the circulation of the issue in question.—*Rumney v. Walter*, 40 W.R. 174.
- (ii.) **C. A.**—*Divorce—Settlement of Wife's Property—Inquiry before Final Decree—Matrimonial Causes Acts, 1857, s. 45; 1860, s. 6.*—The Court has jurisdiction, before the pronouncing of a final decree of divorce or judicial separation against a guilty wife, to direct an inquiry as to what property she is entitled to, in order that the Court may be in a position, when the final decree is pronounced, to direct a settlement thereof.—*Midwinter v. Midwinter*, 61 L.J. P. 1; 65 L.T. 438; 40 W.R. 33.
- (iii.) **Q. B. D.**—*Documents Impounded—Inspection—Copies—R.S.C., 1883, O. xlii., r. 83 (a).*—When documents have been impounded the Court will not part with them, but will give leave for inspection. Copies may not be taken.—*E. p. The Incorporated Law Society*, 55 L.T. 584.
- (iv.) **Ch. D.**—*Execution—Stay Pending Appeal—Jurisdiction—Domicil.*—A stay of execution pending appeal will not be granted except under special circumstances. The fact that the respondents were a Scotch company was held not to constitute special circumstances.—*In re Queensland Mercantile Agency Co.*, 61 L.J. Ch. 48.
- (v.) **C. A.**—*Garnishee—Debt Due—Counter-Claim by Garnishee.*—The defendants were handed a sum of money by X. to be applied for a specific purpose, which failed. X. was indebted to them in a larger amount than such sum. The plaintiff, having recovered judgment against X., sought to attach the sum in the defendants' hands by means of a garnishee order. *Held*, that the sum could be so attached, for the fact that the defendants would have had a good counter-claim against X. in an action brought by him, did not affect their debt to him for the sum which was intrusted to them for a specific purpose.—*Stumore v. Campbell*, 40 W.R. 101.
- (vi.) **Q. B. D.**—*Interpleader—Goods Seized by Sheriff—Application for Particulars.*—A sheriff under a writ of *fi. fa.* seized goods as the property of the defendant. The defendant's wife claimed the goods as her separate property, and applied for an order that the sheriff should deliver particulars of the goods seized. *Held*, that the application ought to be refused.—*Bauly v. Krook*, 65 L.T. 377.
- (vii.) **Q. B. D.**—*Libel—Justification—Criticism.*—Action for libel contained in the review of a book written by the plaintiff, which review contained the following passage: “Not to put too fine a point upon it, the author, by his own confession, is a most barefaced liar.” The defendants pleaded that so far as the alleged libel was a matter of fact it was true, and so far as it was a matter of criticism it was published *bonâ fide*. *Held*, that the defendants ought to deliver particulars pointing out and referring to the particular passages of the book which they relied on in support of the statement.—*Devereux v. Clarke*, L.R. [1891] 2 Q.B. 582; 60 L.J. Q.B. 772.

- (i.) **C. A.**—*Married Woman—Leave to Defend on Payment into Court—Judgment for Plaintiff—Right to Take Money Out—R.S.C., 1883, O. xiv., rr. 1, 6.*—A married woman having property not subject to a restraint on anticipation, covenanted to pay money, and was sued on the covenant after the death of her husband. On an application for judgment she obtained leave to defend on paying into Court the sum claimed. The plaintiff having obtained judgment, *held*, that he ought to have the amount paid out to him without any inquiry as to whether the defendant had any separate estate not subject to restraint.—*Bird v. Barstow*, L.R. [1892] 1 Q.B. 94; 61 L.J. Q.B. 1; 65 L.T. 656; 40 W.R. 71.
- (ii.) **C. A.**—*New Trial—Writ of Inquiry for Assessment of Damages.*—Where the defendant in an action in the High Court does not appear, and a writ of inquiry issues to the sheriff to assess the damages with a jury, if either party desires to question the assessment, the motion for a new trial must be made in the Court of Appeal.—*William Radam's Microbe Killer Co. v. Leather*, L.R. [1892] 1 Q.B. 85; 61 L.J. Q.B. 88; 65 L.T. 604; 40 W.R. 83.
- (iii.) **C. A.**—*Non-suit—Power of Judge.*—The judge, at the trial of an action, cannot non-suit the plaintiff upon the opening statement of his counsel, except with the consent of the counsel.—*Fletcher v. London and North Western Railway*, L.R. [1892] 1 Q.B. 122; 61 L.J. Q.B. 24; 65 L.T. 605; 40 W.R. 182.
- (iv.) **Ch. D.**—*Person of unsound Mind—Action by next Friend—Application to be dismissed—Inquiry.*—An action was commenced in the name of B., a person of unsound mind not so found, by his next friend. B. applied to have his name removed from the record, on the ground that he was not of unsound mind, and had not authorised the action. *Held*, that there ought to be an inquiry as to his capacity.—*Howell v. Lewis*, 40 W.R. 88; 65 L.T. 672.
- (v.) **P. D.**—*Probate—Costs—Notice that Plaintiff only insisted on Proof in Solemn Form—R.S.C., 1883, O. xxi., r. 18.*—The defendants, as executors, obtained probate of a will in common form. The plaintiff, after receiving information from the defendants, issued a writ claiming revocation of the probate. The defendants set up the will, and counter-claimed for probate to be delivered out. The plaintiff, in his reply, set forth the grounds on which he impeached the will, and gave notice that he did not intend to call witnesses, but only insisted on proof in solemn form. *Held*, that the notice did not protect him from being condemned in costs.—*Tappenden v. Lucas*, 65 L.T. 684.
- (vi.) **P. D.**—*Probate—Will of Lunatic—Motion for Administration—Notice to Persons interested under Will.*—The deceased, while of unsound mind, wrote out a document in form of a will, which was, on the face of it, duly executed and attested. He purported thereby to dispose of a large property, though at the time he was entirely without means. He afterwards became entitled to a small property, and died leaving a widow and children. The widow, whom the deceased purported to benefit largely by the will, moved the Court to pass over that document, and to grant her letters of administration, as upon an intestacy. *Held*, that the application could not be granted without notice to all persons interested in the will.—*In the goods of Rich*, 65 L.T. 352.
- (vii.) **Ch. D.**—*Receiver—Obstruction of Right of Way—Leave to Abate.*—By the judgment in an action by X. against the defendant C. it was declared that X. was entitled to a right of way over a footpath on which C. had erected a house, but the Court refused to grant a mandatory injunction for the removal of the house. The plaintiff had brought a

mortgagee's action for foreclosure in respect of the house, and a receiver had been appointed. *Held*, on the application of X., that he was entitled to an order giving him leave, notwithstanding the receiver, to pursue any remedies, or do any acts that he might lawfully take or do to abate the obstruction.—*Lane v. Capsey*, L.R. [1891] 3 Ch. 411; 65 L.T. 375; 40 W.R. 87.

- (i.) **C. A. & Q. B. D.**—*Service—Foreign Firm—R.S.C.*, 1883, O. xlviii, rr. 1, 3.—A firm, whose members are neither by nationality or residence subject to English law, cannot, without leave, be served through their manager or agent in England, even though they carry on business in England. Even where a firm carries on business within rule 1, it does not necessarily follow that it has a place of business within rule 3.—*Grant v. Anderson*, L.R. [1892] 1 Q.B. 108; 65 L.T. 619.
- (ii.) **Q. B. D.**—*Service of Writ out of Jurisdiction—Contract affecting Land—R.S.C.*, 1883, O. xi, r. 1 (b) (g).—An action for breach of a covenant to repair hereditaments within the jurisdiction is an action to enforce a contract affecting hereditaments situate within the jurisdiction. Where an action is properly brought against several defendants, one of whom is domiciled without the jurisdiction, the Court is not prevented from ordering service on him out of the jurisdiction by the fact that the other defendants have not been served.—*Tassell v. Hallen*, 40 W.R. 221.
- (iii.) **Q. B. D.**—*Service out of Jurisdiction—Writ—Contract—R.S.C.*, 1883, O. xi, r. 1 (e).—A contract between English and Italian merchants provided for the delivery of coals in Italy at a price specified in English money, payment to be made "in cash against receipt of the documents." In the course of previous transactions payments had been made by cheques upon English banks sent by post from Genoa. *Held*, by Lord Coleridge, C. J. (Matthew, J., dissenting), that the payment was to be made in England; and that the contract, therefore, was one "which, according to the terms thereof, ought to be performed within the jurisdiction."—*Fry v. Raggio*, 40 W.R. 120.
- (iv.) **P. C.**—*Ship—Bail.*—Rule No. 15 of the Privy Council Rules of 1865, providing for giving bail for costs in maritime cases, may be dispensed with in a proper case, as, e.g., when bail has been already given in the colony from which the appeal is brought.—*Hunter v. S.S. Hesketh*, L.R. [1891] A.C. 628.
- (v.) **Q. B. D.**—*Special Indorsement—Amendment—R.S.C.*, 1883, O. xiv, r. 1; O. iii, r. 6.—The defendant appeared to a writ indorsed with a claim for a liquidated sum, and also with a claim for use and occupation of premises. On the hearing of a summons for final judgment the master gave leave to amend the indorsement by striking out the latter claim, and adjourned the summons. A copy of the amended writ was served, and upon the adjourned summons (there being no affidavit as to the merits) the master made an order for final judgment for the liquidated amount. *Held*, that there was no jurisdiction to do so, as the defendant had not appeared to a specially indorsed writ.—*Gurney v. Small*, L.R. [1891] 2 Q.B. 584; 60 L.J. Q.B. 774.
- (vi.) **Ch. D.**—*Trade Mark—Rectification of Register—Notice of Motion—Service out of Jurisdiction—Patents, &c., Act*, 1883, s. 90—*Trade Marks Rules*, 1890, r. 49—*R.S.C.*, 1883, O. v, r. 9; O. xi, r. 1; O. xii, r. 30; O. lxvii, r. 5.—An originating notice of motion to rectify the Register of Trade Marks by removing the marks of a foreign company, having no place of business in the United Kingdom, was served on the company in Paris, without leave for service out of the jurisdiction. The company and the Comptroller-General were named as respondents. *Held*, that the company ought not to have been so

named, and that the service was wrong, and must be set aside. Directions given for procedure. *Semble*, that the Court has no power to give leave to serve such a notice of motion out of the jurisdiction.—*In re Compagnie Générale d'Eaux Minérales*, 60 L.J. Ch. 728; 40 W.R. 89.

- (i.) **Q. B. D.**—*Transfer of Action to County Court*—"Court in which Action might have been commenced, or in any Court convenient thereto"—*County Courts Act*, 1888, ss. 65, 74.—In an action of contract for a sum not exceeding £100 the plaintiff dwelt in Yorkshire, and the defendant dwelt and carried on business in Westminster. The cause of action arose partly within the County Court district in which the plaintiff dwelt. *Held*, that the judge had jurisdiction to send the action for trial to any County Court which was "convenient," having regard to the convenience of the parties, and that he could properly exercise that jurisdiction by sending the action for trial to the County Court in Yorkshire.—*Burkill v. Thomas*, L.R. [1892] 1 Q.B. 99; 40 W.R. 222.

Principal and Agent:—

- (ii.) **C. A.**—*Purchase by Agent—Agency denied—Statute of Frauds*—(See Vol. 16, p. 57, i.).—The Court, finding that the plaintiff had not established the agency, did not enter into the question of the application of the Statute of Frauds.—*James v. Smith*, 65 L.T. 544.

Public Health:—

- (iii.) **Q. B. D.**—*Building Line—Building in Two Streets—Question of Fact—Public Health (Buildings in Streets) Act*, 1888, s. 3.—A house was being erected at the junction of O. and C. roads, abutting on the footpath of C. road. The main entrance was in O. road. There was a row of small cottages in C. road set back eight feet from the footpath, situate sixty-four feet from the back wall of the premises attached to the house in question. *Held*, that it was a question of fact for the Justices whether the house was, or was not, in both O. and C. roads, and also whether the cottages were so near the house as to be on one side thereof; the Justices having convicted the owner of the house of advancing his building beyond the front main wall of the building on the side thereof in the same street, without consent of the urban authority.—*Warren v. Mustard*, 61 L.J. M.C. 18.

Railway:—

- (iv.) **Q. B. D.**—*Duty to Passenger—Unpopular Passenger—Assault on—Protection*.—The plaintiff, who had incurred unpopularity in a mining district, was travelling by the defendants' line in that district. He sought to travel in the guard's van, but was compelled to enter an ordinary carriage. A number of miners entered the carriage, greatly overcrowding it, and assaulted the plaintiff. *Held*, that the assault was not the result of the overcrowding, and that the company were not bound to provide special protection for the plaintiff, whose unpopularity was not known at the time the contract of carriage was entered into, and were, therefore, not liable in damages for the assault.—*Pounder v. N.E.R.*, 65 L.T. 679; 40 W.R. 189.
- (v.) **C. A.**—*Land—Notice to Treat—Deposited Plans—Delineated*.—The defendant company had power to take lands delineated in the deposited plans, and described in the deposited book of reference. The plaintiff owned a nursery garden, described as such in the book of reference, and numbered 235. Part of such garden was included within the limits of deviation in the deposited plans, but the boundaries of such part of

the garden as lay outside the limits of deviation were not shewn in the plans, though certain footpaths in the garden, and also the eastern boundary of the garden, were shewn by the plans to project for an indefinite distance beyond such limits of deviation. *Held*, that no part of the garden lying outside the limits of deviation was "delineated and described" in the plans and book of reference; and that the company could not take under their compulsory power any part of the garden lying outside such limits.—*Protheroe v. Tottenham and Forest Gate Railway Co.*, 65 L.T. 323; 40 W.R. 278.

See Sale of Goods, p. 63, ii.

Registration:—

- (i.) **Q. B. D.**—*Lodger Franchise—Notice of Claim—Attestation—Parliamentary, &c., Registration Act, 1878, ss. 23, 25.*—The signature of the witness attesting a notice of claim for the lodger franchise must be contemporaneous with the signature of the claimant.—*Body v. Halse; Hunt v. Halse; Fenning v. Halse*, 40 W.R. 206.
- (ii.) **Q. B. D.**—*Occupation—Stand in Market—Representation of the People Act, 1884, ss. 5, 7, sub-s. 7—Reform Act, 1832, s. 27.*—H. was lessee of the area of a market. He allowed A. to occupy a stall, and B. to occupy a stand for a cart, in consideration of fixed prices, of an annual amount exceeding £10. The stands were not marked off, but had known limits. If a stand or stall was not occupied on any market day by the person who paid for it, H. could allow any other applicant to occupy it, but the agreed price for the right to occupy was paid whether the stand or stall was occupied or not. H. could give notice to quit at any time, and sometimes did so verbally. *Held*, that A. and B. were entitled to be registered as occupiers of "land or tenement of an annual value of not less than £10, as tenants."—*Hall v. Metcalfe*, 61 L.J. Q.B. 53.
- (iii.) **Q. B. D.**—*Refusal of Revising Barrister to place mark against Name—Appeal—County Electors Act, 1888, s. 7, sub-s. 5.*—There is no appeal from the refusal of the revising barrister to place an asterisk or other mark against a name entered more than once in the list of voters in the same electoral division for the county council.—*Arnold v. Clerk of the Peace for Kesteven*, 65 L.T. 618.
- (iv.) **Q. B. D.**—*Transfer of Name—Power of Revising Barrister—Parliamentary and Municipal Registration Act, 1878, ss. 15, 24, 28, sub-ss. 12, 13.*—A revising barrister has no power to transfer the name of an elector from Division III. of the occupiers' list to Division I., the elector having made no claim to be put on Division I.—*Lord v. Fos*, 65 L.T. 617.

Restraint of Trade:—

- (v.) **Ch. D.**—*Covenant not to carry on Business—Acting as Agent.*—Where a person covenants not to carry on "either directly or indirectly, on his own account, or as agent, or assistant of, or in partnership with, any other person," or "be interested or concerned in" a certain business within two miles of the covenantee's premises, he does not break the covenant by acting outside the limit of two miles for a firm who carry on the said business within such limit.—*Fairbrother v. England*, 40 W.R. 220.

Revenue:—

- (vi.) **H. L.**—*Income Tax—"Charitable Purposes"—Missions.*—Decision of C. A. (*see Vol. 14*, p. 90, ii.) affirmed.—*Commissioners for Income Tax v. Pemsel*, L.R. [1891] A.C. 531; 65 L.T. 621.

Sale of Goods :—

- (i.) **Q. B. D.—Market Overt.**—Jewels were sold to a jeweller in the City of London in a show-room over his shop to which customers were only admitted by special invitation. *Held*, that the sale was not in market overt. *Semble*, that the custom of market overt does not apply where the shopkeeper is the purchaser, and not the seller, of the goods.—*Hargreave v. Spink*, L.R. [1892] 1 Q.B. 25; 65 L.T. 650.
- (ii.) **Ch. D.—Railway Company—Rolling Stock—Hiring Agreement—Sale or Loan.**—A railway company, at a time when its borrowing powers were exhausted, sold certain rolling stock to W., and immediately afterwards entered into a hire-and-purchase agreement with W., by which the said rolling stock was hired by the company for a year, at a rent payable by instalments, on the due payment of which the rolling stock was to become the property of the company. It was admitted that the object of the transaction was that the company should obtain a sum of money by means of the rolling stock, while retaining the possession and use thereof. *Held*, however, that there was a complete sale of the rolling stock, and that such sale and the hire-and-purchase agreement consequent thereon were good. *Held*, also, that a debenture-holder of the company was entitled to oppose W.'s claim to rank as a creditor under the said agreement.—*In re Eastern & Midlands Railway Company*, 65 L.T. 668.

See Vendor and Purchaser, p. 69, i.

Scotch Law :—

- (iii.) **H. L.—Bankruptcy—Discharge of Trustee and Bankrupt—Appointment of New Trustee—Jurisdiction—Bankruptcy (Scotland) Act, 1856, ss. 102, 103, 132, 152, 155.**—Certain creditors upon a sequestrated estate, the trustee on which and also the bankrupt had been discharged, the latter without composition, petitioned the Court of Session for a remit to the Lord Ordinary to appoint a meeting of creditors for the election of a new trustee, alleging that there were funds belonging to the estate which had not been recovered, and that the petitioners had not been paid in full. There was no concealment or fraud alleged. The bankrupt opposed and claimed the funds. *Held*, that the Court had jurisdiction to make the order, although the Scotch Bankruptcy Act contains no express provision for such a case, it being merely machinery to give effect to the rights of creditors.—*Whyte v. The Northern Heritable Securities Investment Co.*, L.R. [1891] A.C. 608.
- (iv.) **H. L.—Husband and Wife—Sale of English Real Estate—Surrogatum—Donation inter Virum et Uxorem.**—The wife of a domiciled Scotchman, with her husband's concurrence, sold real estate situate in England. The conveyance was acknowledged by her, and she declared that she intended to give up her interest in the estates without having any provision made for her in lieu thereof. Her husband received the price. There was no marriage contract. The husband and wife separated by mutual consent. She brought an action for a declaration that the price of the estates in his hands was either a *surrogatum* for her heritage, and not subject to the *jus mariti*, or was a donation to him which she had validly revoked. *Held*, that as both spouses possessed undetermined interests in the real estate, the price was not a *surrogatum* for heritage belonging solely to the wife, and that her assent to his receiving the price could not be regarded as a donation *inter virum et uxorem*.—*Welch v. Tennent*, L.R. [1891] A.C. 639.

- (i.) **H. L.—Lunatic—Curator Bonis—Inquiry before Jury—Discretion of Court.**—The wife of a man who was detained in a lunatic asylum petitioned for the appointment of a *curator bonis* to her husband. He opposed the petition, maintaining that he ought not to be superseded in the management of his affairs until a cognition had issued to obtain the finding of a jury on his case. He did not dispute the propriety of his detention, but stated that such delusions as affected him did not interfere with his business capacity. The Court of Session appointed a *curator bonis*, on consideration of the medical reports obtained by the petitioner, by the alleged lunatic, and by the Lord Ordinary. *Held*, that the practice of the Court of Session warranted such an exercise of its discretion.—*A. B. v. C. D.*, L.R. [1891] A.C. 616.
- (ii.) **H. L.—Parent and Child—Right to sue for Death of Illegitimate Child.**—The parent of an illegitimate child has, by the law of Scotland, no right of action against a person whose negligence has caused the death of the child.—*Clarke v. The Carfin Coal Co.*, L.R. [1891] A.C. 412.
See Easement, p. 43, v.

Settled Land:—

- (iii.) **Ch. D.—Sale—Tenant for Life—Mansion House.**—The tenant for life, in deciding whether settled land ought or ought not to be sold, must act as an honest and independent trustee on behalf of himself and all other members of the family. Where a tenant for life asked the sanction of the Court to a proposed sale of a mansion-house and settled estate, and it appeared that he was entirely insolvent, and that his pecuniary position would not be improved by the proposed sale, the benefit of which would accrue to his creditors rather than to himself, *held*, that he had not, as such honest and independent trustee, duly considered the interests of the parties entitled under the settlement, and, the sale being opposed by all the remainder-men in existence, that the sanction of the Court must be refused.—*In re Marquis of Ailesbury's Settled Estates*, 65 L.T. 409.

Sheriff:—

- (iv.) **Q. B. D.—Costs of Possession.—Unreasonable Period.—Bankruptcy Act, 1883, s. 46.**—A sheriff who has remained in possession for an unreasonable time at the instance of the execution creditor, and without the debtor's consent, is not entitled to charge against the debtor the costs of retaining such possession beyond what is a reasonable period. *Quære*, what is the duty of the sheriff when the execution creditor desires him to retain possession and not to sell.—*E. p. Sheriff of Essex*; *in re Finch*, 65 L.T. 466; 40 W.R. 175.

Ship:—

- (v.) **P. D.—Collision—Damages—Jettison of Cargo—Claim for General Average.**—In a collision between an English and a Dutch ship, the former was so injured that she had to jettison cargo. In an action *in rem* for damages the Dutch ship was found alone to blame. The owners of the English ship claimed to recover as damages the balance due in general average contribution from ship to cargo in respect of the jettison, after deducting the amount due from cargo to ship. *Held*, that the claim could not be allowed, as the loss sustained in having to make the general average contribution was not directly due to the collision, but arose from the relation between ship and cargo.—*The Marpessa*, L.R. [1891] P. 403.

- (i.) **P. D.**—*Collision—Burden of Proof—Right to begin—Inevitable Accident.*—The defendant's ship ran into the plaintiff's ship while it was at anchor. The defendant did not charge the plaintiff with negligence, but alleged that the collision was caused by inevitable accident. *Held*, that the defendant must begin as the onus was on him to disprove negligence. He proved that the accident was caused by the steering gear of his ship failing to work; that the steering gear was good of its kind, and had not previously failed, and that the cause of the defect, or obstruction in the working, could not be discovered by competent persons. *Held*, that he had disproved negligence, and was not liable.—*The Merchant Prince*, L.R. [1892] P. 9.
- (ii.) **H. L.**—*Collision—Infringement of Regulations—Presumption of Blame.*—The true construction of sect. 17 of the Merchant Shipping Act, 1873, is that the infringement of the regulations on account of which the infringing vessel is to be deemed to be in fault, must be an infringement which had some possible connection with the collision, or, in other words, the presumption of culpability which arises from the infringement may be met by proof that the infringement could not possibly have contributed to the collision, and the burden of showing this lies on the party guilty of the infringement, proof that such infringement did not in fact contribute to the collision being excluded.—*The Duke of Buccleugh*, L.R. [1891] A.C. 310; 65 L.T. 422.
- (iii.) **C. A.**—*Demurrage—Charter-party—Detention at Port of Discharge.*—A charter-party provided that the ship should proceed to the Mersey, and deliver cargo at any safe berth, as ordered, on arrival in the G. dock. When she arrived in the dock the berths were all occupied, and she was detained several days before being ordered to a berth. *Held*, that the charterer was not liable for demurrage for the delay, as the carrying voyage was not completed until the ship arrived in the berth as ordered by the charterer.—*Tharsis Sulphur and Copper Co. v. Morel Brothers & Co.*, L.R. [1891] 2 Q.B. 647; 61 L.J. Q.B. 11; 65 L.T. 659; 40 W.R. 58.
- (iv.) **Q. B. D.**—*Demurrage—Charter-party—"Despatch as Customary"—Strike—Default of Dock Company.*—A charter-party provided that cargo should be discharged at G. "with all despatch as customary." *Held*, that the charterers were liable for delay caused by a strike of labourers at G., but not for delay caused by the default of the dock company at G., which, according to the custom of the port, did the work of discharging, and whose dilatory conduct in so doing was well known to and taken into account by persons chartering their ships to G.—*Castlegate Steamship Co. v. Dempsey*, L.R. [1892] 1 Q.B. 54.
- (v.) **C. A.**—*Demurrage—Charter-party—Strike.*—A charter-party provided that the ship named should load cargo in Russia, and discharge the same at a port in the United Kingdom, that the freighters liability should cease when the cargo was shipped, and that the owner should have a lien for freight and demurrage at the port of discharge. The bills of lading contained no clause to relieve the consignees from loss occasioned by strikes. In consequence of a strike among the dock labourers at the port of discharge, delay occurred in unloading the ship. The owners sued the freighters and consignees for demurrage for such delay. *Held*, that the consignees were not liable, as the delay was not caused by them, or their agents or servants, but by causes beyond their control.—*Hick v. Rodocanacht*, L.R. [1891] 2 Q.B. 626; 61 L.J. Q.B. 42; 65 L.T. 300; 40 W.R. 161.
- (vi.) **H. L.**—*Grounding of Vessel—Liability of Dock Owners.*—Decision of C. A. (see Vol. 15, p. 62, vi.) reversed.—*Little v. Port Talbot Co.*, L.R. [1891] A.C. 499; 65 L.T. 690.

- (i.) **C. A.**—*Injury to Crew—Liability of Owner—Common Employment—Unseaworthy—Merchant Shipping Act, 1876, s. 5.*—The master and crew of a ship are engaged in a common employment, and the owner is not liable for the negligence of the master whereby one of the crew is injured. A ship properly equipped to encounter the ordinary perils of the sea does not become "unseaworthy" within the meaning of the Merchant Shipping Act, 1876, sect. 5, because the master negligently omits to use part of the equipment. Where the master negligently omitted to have the rail which closed the gangway shipped in heavy weather, whereby one of the crew was washed overboard and drowned, *held*, that the owner was not liable. *Quære*, whether a ship would be unseaworthy within the meaning of the above-mentioned section by reason of a defect in her equipment which did not affect the safety of the ship, but might affect the safety of individuals on board.—*Hedley v. Pinkney & Sons' Steamship Co.*, L.R. [1892] 1 Q.B. 58; 40 W.R. 113.
- (ii.) **H. L.**—*Insurance—Construction of Policy—Collision—Tug.*—The appellant insured the N. from the Clyde (in tow) to C., and agreed, by the policy, "if the ship hereby insured shall come into collision with any other ship or vessel, and the insured shall in consequence thereof become liable to pay, and shall pay, to the persons interested in such other ship or vessel, any sum or sums of money" to pay to the assured a certain proportion of the sum so paid. While the N. was being towed the tug came into collision with another ship, owing to the joint negligence of the tug and the N., and the owners of such ship recovered damages against both the tug and the N. *Held*, that such collision must be taken to have been a collision of the N. with another vessel within the meaning of the policy.—*McCowan v. Baine*, L.R. [1891] A.C. 401; 65 L.T. 502.
- (iii.) **P. C.**—*Insurance—Open Policy—Declaration—Onus Probandi.*—Where the insurer resists payment of a risk on the ground of misrepresentation, the onus is on him to prove very clearly that such misrepresentation has been made. An open policy was granted on goods shipped from Melbourne to London, by one specified line of ships to Sydney, and thence by another specified line to London, covering risk while in a specified factory at Sydney, "declarations to be made within forty-eight hours after departure of steamer from Sydney." *Held*, that two declarations must be made by the insured, one as incident to every contract of an open policy, to identify the shipments at Melbourne to which the policy was to attach, and necessary by law to make the policy operative; the other, under the terms of the policy, giving particulars relating to such goods as had been already brought within the policy by a previous declaration apt for that purpose, and had since been actually shipped for London. *Semble*, though there is no positive law in New South Wales that contracts of marine insurance must be in writing, yet the general authority given to the agent of an insurance company must be to make contracts in the ordinary way, and that is by writing.—*Davies v. National Fire and Marine Insurance Company of New Zealand*, L.R. [1891] A.C. 495; 60 L.J. P.C. 73; 65 L.T. 560.
- (iv.) **C. A.**—*Salvage—Amount—Appeal.*—The Court of Appeal will alter the amount of salvage awarded, if, after a careful consideration of the facts, and after giving every possible weight to the view of the Judge, the Court is of opinion that the amount is too large or too small, although it is not so large or so small that no reasonable person could fairly arrive at that sum.—*The Accomac*, L.R. [1891] P. 349.

Solicitor:—

- (i.) **Ch. D.**—*Change of Solicitors—Lien on Documents.*—The plaintiff was suing for partition instead of sale. She and the defendant were interested in the property, in moieties, subject to incumbrances (if any). The plaintiff changed her solicitors, and an order was made that they should deliver to her new solicitors "such deeds, papers, and writings as might be necessary for the conduct of the action," to be retained subject to the lien (if any) of the late solicitors. They had acted for her in other matters prior to the action. *Held*, that as there might be persons other than the plaintiff and defendant interested in the property, the order was rightly made; but that it must be limited to documents acquired since the commencement of the action or for the purposes thereof.—*Boden v. Hensby*, 40 W.R. 205.
- (ii.) **Q. B. D.**—*Costs—Collusive Compromise of Action.*—Where the parties to an action compromised it with the knowledge that by so doing they were depriving the plaintiff's solicitor of his costs, such solicitor is entitled to an order for payment of his taxed costs by the defendant, or for continuance of the action for the recovery of such costs.—*Price v. Crouch*, 60 L.J. Q.B. 767.
- (iii.) **Ch. D.**—*Commissioner for Oaths—Struck Off Rolls—Capacity—22 Vict., c. 16, s. 1—Commissioner for Oaths Act, 1889, s. 1—R.S.C., 1883, O. xxxviii., r. 16.*—A solicitor had been appointed by the Court of Exchequer as Commissioner for Oaths. He had since been struck off the rolls, but his commission had never been superseded. *Held*, that he was still capable to act, and that an affidavit sworn before him could not be taken off the file, as the commission could only be revoked, formerly by the Court of Exchequer, and now by the Lord Chancellor.—*Ward v. Gamgee*, 65 L.T. 610; 40 W.R. 39.

Tenant for Life:—

- (iv.) **Ch. D.**—*Possession—Fixtures—Right to Sue—Altar Stone in Private Chapel.*—The altar stone, and a case of relics fitted under the altar, in a private Roman Catholic chapel forming part of a mansion house would not pass under a bequest of "furniture and articles of household use or ornament." The plaintiff became tenant for life of such mansion when a minor, and the house was in possession of caretakers. The trustees of the settlement demised the house under their powers, by a lease which operated by way of revocation and new appointment of uses. The lessee removed the altar stone and case of relics. *Held*, that they were part of the chapel, and that the plaintiff had sufficient title by virtue of his estate to sue for their recovery; and if they were not part of the chapel, he had sufficient title to sue by virtue of his possession of the house by his servants prior to the grant of the lease. *Held*, also, that the Court could not recognize an alleged law of the Roman Catholic Church, according to which the articles ought to be handed over to the bishop on the licence to use the chapel for mass being withdrawn.—*Petre v. Ferrers*, 65 L.T. 568.
- (v.) **C. A.**—*Waste—Timber—Local Custom.*—Decision of Ch. D. (*see* Vol. 16, p. 101, ii.) affirmed.—*Dashwood v. Magniac*, L.R. [1891] 3 Ch. 306; 60 L.J. Ch. 809.

Trade Mark:—

- (vi.) **Ch. D.**—*Alteration of Register—Patents, &c., Act, 1883, s. 92.*—Labels registered in 1878 as old marks, contained with other matter, the words "trade-mark," so placed as to appear to have particular reference to the device on the labels, rather than to the labels as a whole. The

owner applied for leave to alter the register, by striking out the words "trade-mark." *Held*, that to strike out the words would be a material alteration, and that the marks, being old marks, ought to be registered just as they were used prior to August, 1875; and that, as there had been an indication in the marks, as registered, of an intention to claim only the device as the trade-mark, the same indication of a restricted claim ought to be retained on the register. Application refused.—*In re Phillips' Trade-marks*, L.R. [1891] 3 Ch. 139; 61 L.J. Ch. 40; 65 L.T. 373.

- (i.) **C. A.**—*Fancy Words—Combination—Patents, &c., Act, 1883, s. 64 (1) (c), s. 74 (1) (b) (2).*—Decision of Ch. D. (*see* Vol. 17, p. 29, i. affirmed.—*Pirie v. Goodall*, L.R. [1892] 1 Ch. 35; 65 L.T. 640; 40 W.R. 80.

Trustee:—

- (ii.) **C. A.**—*Inquiry by Incumbrancer—Notice.*—A mortgagee of an equitable interest who, before taking his charge, either makes no inquiry of, or, having made inquiry, receives no definite answer from, every trustee of the fund as to prior incumbrances, will be postponed to any prior incumbrance of which, at the time when such inquiry was or ought to have been made, any one of the then existing trustees had notice. Decision of Ch. D. (*see* Vol. 17, p. 30, iii.) affirmed.—*White v. Ellis*, 40 W.R. 177.
- (iii.) **Ch. D.**—*Information to Cestui-que-Trust.*—A person contingently entitled, after the death of a tenant for life, to a share of a trust fund, though assured by the trustees that the fund is invested in consols in their names, and free from any claims, is nevertheless entitled to an authority from the trustees enabling him to ascertain from the Bank if there be any charging order or distringas against the consols.—*Lee v. Wilson*, 61 L.J. Ch. 38; 40 W.R. 204.

Vaccination:—

- (iv.) **Q. B. D.**—*Summary Proceedings—Authority of Vaccination Officer—Vaccination Act, 1867, s. 31.*—The words "further proceedings" in article 16 of the Local Government Board Regulations issued under the Vaccination Act, do not apply to proceedings taken for the imposition of a penalty on non-compliance with a vaccination order, except where a penalty has already been imposed, and it is sought to impose a fresh penalty in respect thereof.—*Reg. v. Brocklehurst*, 65 L.T. 714; 40 W.R. 64.

Vendor and Purchaser:—

- (v.) **Ch. D.**—*Abstract—Delivery of—Reasonable Time—Rescission—Damages.*—A contract for the sale of a farm provided that a title should be deduced to the satisfaction of the purchaser's solicitors, and that possession should be given on or soon after Michaelmas day. On August 28th, an incomplete abstract was delivered, and the purchaser's solicitors asked for a further abstract. A deposit was paid on September 1st. Repeated requests for the further abstract were not complied with, and on October 13th the purchaser's solicitors wrote that the contract would be rescinded if such abstract were not delivered within fourteen days. It was not sent, and the purchaser rescinded the contract on November 8th. The further abstract was sent on November 29th, but was returned. *Held*, that, under the circumstances, the fourteen days was a reasonable time, and that the purchaser was entitled to have his deposit returned with interest, and to be paid the costs of investigating the title by way of damages.—*Compton v. Bagley*, 65 L.T. 706.

- (i.) **Ch. D.**—*Conditions of Sale—Defect in Title—Unknown Right of Way—Right to Rescind.*—An agreement for the sale of a house and land in fee contained a statement that the description was believed to be correct, and a provision that any error therein should not annul the contract, but should be a matter for compensation; and also a clause empowering the vendor to rescind the contract if the purchaser should insist on any objection or requisition in respect of the title which the vendor should be unable or unwilling to remedy or comply with. There was no provision as to rights of way. It appeared that there was a right of way across the property, of which, at the date of the agreement, both the vendor and the purchaser were ignorant. The purchaser insisted on compensation. *Held*, that the objection was an objection as to title, and that the vendor was entitled to rescind the contract.—*Ashburner v. Sewell*, L.R. [1891] 3 Ch. 405; 60 L.J. Ch. 784; 65 L.T. 524; 40 W.R. 169.
- (ii.) **Ch. D.**—*Lien on Purchase Money—Delivery of Article.*—The B. company had agreed to supply two tanks to D. They agreed with the plaintiff that he should erect the tanks on the premises of D., the tanks being too large to be made elsewhere and then brought on to the premises. No part of the purchase money was to be paid until the tanks were completed. Before the tanks were completed the B. company became insolvent. *Held*, in an action to decide the rights of all parties, that the tanks were not delivered to the purchasers until they were complete; that the property remained in the plaintiff until completion and delivery; that he was not bound to deliver the tanks until he was paid, and that he was entitled to a first charge on the purchase money payable by D. to the B. company.—*Bellamy v. Davey*, L.R. [1891] 3 Ch. 540; 60 L.J. Q.B. 778; 65 L.T. 308; 40 W.R. 118.
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Vestry Clerk :—

- (iii.) **Q. B. D.**—*Quo Warranto.*—An information in the nature of *quo warranto* lies in respect of the office of clerk to a parish vestry.—*Reg. v. Burrows*, 40 W.R. 207.

Will :—

- (iv.) **Ch. D.**—*Accumulation—Repairs—Thellusson Act.*—A testator, who possessed numerous freehold and leasehold messuages, bequeathed legacies and annuities, and devised and bequeathed his real and personal estates to trustees, on trust to convert the pure personal estate, and to form a general trust fund. He directed the rents of his real and leasehold estate, and the income of the trust fund, to be applied in paying the ground rents of the leaseholds, and in keeping the messuages insured and in repair, and in paying the annuities, and directed the surplus income to be accumulated, declaring that the cost of rebuilding and substantially repairing any building, and any deficiency in the insurance moneys to be received in case of the destruction of any building by fire, should be made good out of the general trust fund. He also declared trusts of the real and leasehold estate and of the general trust fund after the death of the survivor of the annuitants. *Held*, that there was an express direction for the accumulation of income, and that such direction was valid so far as it was a *bonâ fide* provision for the cost of rebuilding, repairing, and re-

instating the buildings, but that subject to the due performance of the trust for such rebuilding, repairing, and reinstating, the trust for investment of the surplus income was invalid as from the expiration of twenty-one years from the testator's death.—*Mason v. Mason*, L.R. [1891] 3 Ch. 467; 61 L.J. Ch. 65.

- (i.) **Ch. D.—Ademption—Specific Legacy.**—A testator bequeathed to A. "the sum of £42,000 New Three per Cents. more or less at the time of my death"; and to B. the sum of £42,000, adding, "this £42,000 more or less at the time of my death, to be the Brazilian Five per Cent. Stock." He also bequeathed to C. "the sum of £42,000 Russian Five per Cent. Stock." The testator at the date of his will possessed £42,000 New Three per Cent. Annuities, £42,000 Brazilian Five per Cent. Bonds, and £42,000 Russian Five per Cent. Bonds. He sold the New Three per Cent. Annuities during his lifetime, and the Brazilian and Russian Stocks were converted by the respective governments into other stocks. *Held*, that the first two legacies were specific and failed, but that the third was pecuniary, being the bequest of the value of that amount of stock.—*Tyler v. Tyler*, 65 L.T. 367.
- (ii.) **Ch. D.—Construction—Ambiguity—Parol Evidence.**—By will, dated in 1884, the testator bequeathed a legacy "to my cousin, Adam R. C. Loftus, son of my late uncle, the Rev. Lord Adam R. C. Loftus, unless he shall immediately on my death succeed to the title of Marquis of Ely." The cousin, Adam R. C. Loftus, had died in 1866, and at the date of the will and of the testator's death the only surviving child of the testator's uncle, other than the son who became Marquis of Ely, was Lord George Loftus. *Held*, that as there was on the face of the will no ambiguity, but a legacy to a non-existent person, parol evidence could not be admitted to shew that the testator had intended to benefit the said Lord George Loftus, and that the name of Adam R. C. Loftus had been inserted in the will by the mistake of the draftsman.—*Tottenham v. Ely*, 65 L.T. 452.
- (iii.) **Ch. D.—Construction—Charity—Gift on Continuing Condition.**—Bequest of a sum towards the endowment of a proposed church, provided certain conditions were fulfilled, among which was the following: "I make it an abiding condition that the black gown shall be worn in the pulpit, unless there shall be any alteration of the law rendering it illegal." *Held*, that the condition was not illegal, and was a continuing one; and that the fund should be carried to a separate account, and the income paid to the incumbent so long as he appeared to fulfil the condition, with liberty to all interested persons to apply.—*Wright v. Tugwell*, 40 L.J. Ch. 17; 40 W.R. 137.
- (iv.) **Ch. D.—Construction—General Devise and Bequest—"Effects."**—Testator gave, devised, and bequeathed to his wife all his "furniture, goods, chattels and effects, whatsoever the same may be or wheresoever the same may be situate." *Held*, to be a general devise and bequest of all real and personal property.—*Hall v. Hall*, L.R. [1891] 3 Ch. 389; 60 L.J. Ch. 802; 65 L.T. 643; 40 W.R. 138.
- (v.) **Ch. D.—Construction—Shares.**—The bequest of all the testator's shares in a public company will not carry debenture stock.—*Bodman v. Bodman*, L.R. [1891] 3 Ch. 135; 61 L.J. Ch. 31; 65 L.T. 522; 40 W.R. 60.
- (vi.) **C. A.—Determinable Interest—"Payable to or Vested in"—Receiving Order.**—Decision of Ch. D. (see Vol. 17, p. 32, v.) affirmed.—*Sartoris v. Sartoris*, L.R. [1892] 1 Ch. 11; 61 L.J. Ch. 1; 65 L.T. 544; 40 W.R. 82.

- (i.) **P. D.—Probate—Executrix and Sole Legatee not to be found.**—Where the executrix and sole legatee, being the illegitimate daughter of the testatrix, had not been heard of for forty years, the Court granted administration with the will annexed to the representative of the next-of-kin of the testatrix, on proof that the executrix had been cited by advertisement, and that the solicitor to the Treasury did not intend to apply for administration to her estate, and subject to administration to the next-of-kin being taken out.—*In the goods of Ley*, L.R. [1892] P. 6.
- (ii.) **P. D.—Probate—Nomination of Executors after Attestation Clause—Erasure.**—A will contained several references to "my executors," and the word "executor," wherever it occurred, was preceded by an asterisk. No executors were named in the body of the will, but below the attestation clause were the words, "executors, W. G. and C. S.," preceded by an asterisk. It was proved that these words were written before execution. After execution the testator erased the name of C. S., who was a witness as well as executor, and wrote the name of W. S. over the erasure. The will was not re-executed. *Held*, that probate should be granted to W. G. and C. S.—*In the goods of Greenwood*, L.R. [1892] P. 7.
- (iii.) **P. D.—Probate—Insufficient Attestation Clause—Refusal of Witnesses to make Affidavit.**—The attestation clause of a will being insufficient, the witnesses all refused to make an affidavit as to the due execution, one of such witnesses being a beneficiary, and another the wife of a beneficiary. *Held*, that the affidavit of the executor to the effect that the signatures of the testator and the witnesses were in their handwriting, and that no one else was present at the execution of the will, was insufficient, but that the witnesses should be ordered to attend for examination.—*In the goods of Sweet*, L.R. [1891] P. 400.

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Quarterly Digest

OF

ALL REPORTED CASES,

IN THE

Law Reports, Law Journal Reports, Law Times Reports, and Weekly Reporter,

FOR FEBRUARY, MARCH, AND APRIL, 1892.

By C. H. LOMAX, M.A., of the Inner Temple,
Barrister-at-Law.

Administration:—

- (i.) **P. D.**—*Grant to Stranger—Infants.*—On the application of the lawfully elected and appointed curator and guardian of three infants, the children of the deceased, who died a widow and intestate, the Court made a grant of administration without the consent of three children of the half-blood, all *sui juris* and resident in England, the grant to be limited to such time as one of the infants should attain full age, and should apply for administration on her own behalf.—*In the goods of Roe*, 66 L.T. 266.
- (ii.) **Ch. D.**—*Judgment—Land delivered in Execution—Devise—Locke King's Acts*, 17 & 18 Vict., c. 113, and 40 & 41 Vict., c. 34—*Judgment Acts.*—Land upon which, by its delivery in execution under a writ of elegit, a judgment has become a charge, is land charged with the payment of a sum of money "by way of mortgage or other equitable charge," and therefore a devisee of land so charged is not entitled to have the judgment satisfied out of the personal estate of the testator.—*Anthony v. Anthony*, L.R. [1892] 1 Ch. 450; 66 L.T. 181; 40 W.R. 316.
- (iii.) **P. D.**—*Estate under £100—Widow a Lunatic—Grant to Guardians—Intestates' Estates Act*, 1890, s. 1.—The widow of an intestate, who left no issue, was a lunatic, the only known next-of-kin had renounced, and the estate was under £100. *Held*, that as the widow was absolutely entitled thereto, administration should be granted to the nominee of the Guardians of the Union to which she was chargeable, for her use and benefit during her lunacy.—*In the goods of Everley*, L.R. [1892] P. 50; 65 L.T. 765.

- (i.) **Ch. D.**—*Legacies payable in Futuro*—*Appropriation—Amount*.—Executors took out a summons for directions as to the securities to be appropriated to meet certain legacies payable *in futuro* at an uncertain date. *Held*, that the legatees were entitled to have their legacies brought into Court and invested in consols; and that the amounts must either be invested in 2½ per cent. consols, or an additional sum equal to one-tenth of the amount of each annuity must be invested in 2½ per cent. consols, to meet the depreciation in the value of the latter stock, which would take place on the reduction of the interest.—*Jeffrey v. Tredwell* (No. 2), 65 L.T. 742.
- (ii.) **P. D.**—*Pending Suit—Summons for Directions—Payment of Debts—Order*.—A creditor who had obtained a grant of administration pending suit, and who had incurred costs in respect of such administration, the amount of which, together with his original debt, amounted to more than the sum which had come to his hands as receiver, was allowed to pay himself the amount, *pro tanto*, of his debt and costs, and thereupon to take his discharge; but the Court refused, on his application, to dismiss the original suit for want of prosecution.—*In the goods of Evans*, 65 L.T. 793.
- (iii.) **Ch. D.**—*Provision for Widow*.—The Intestates' Estate Act, 1890, does not apply to cases of partial intestacy.—*Twigg v. Black*, 40 W.R. 297.
- (iv.) **Ch. D.**—*Voluntary Settlement—Duties—Incidence of—Appointees of Specific Sums and Residue—Customs and Inland Revenue Act, 1881, s. 38, sub-s. 2 (c). s. 41—Customs and Inland Revenue Act, 1889, ss. 5, 6, 11*.—Under a voluntary settlement and the will of the settlor made under a special power of appointment contained therein, trustees were directed, after the death of the settlor (to whom a life interest was reserved), to raise certain sums out of the funds for certain of the settlor's children, and to hold the residue in trust for another child. *Held*, that the "account stamp duty" and the "estate duty" ought to be borne rateably by the appointees of the specific sums and of the residue.—*Deane v. Croft*, 61 L.J. Ch. 190; 66 L.T. 157; 40 W.R. 425.

Adulteration:—

- (v.) **Q. B. D.**—*Milk—"Place of Delivery"*—*Sale of Food and Drugs Act, 1879, s. 3*.—A. had contracted to supply milk to a purchaser to be delivered at Hull, the purchaser to pay the carriage. *Held*, that Hull was the "place of delivery," so that A. could be convicted of adulteration on evidence furnished by the examination of samples taken at Hull.—*Filshie v. Ervington*, 66 L.T. 199; 40 W.R. 380.

Arbitration:—

- (vi.) **Ch. D.**—*Injunction*.—The Court has no jurisdiction to grant an injunction to restrain a person from proceeding with an arbitration in a matter beyond or outside an arbitration agreement, although such arbitration proceedings may be futile and vexatious.—*Wood v. Lillies*, 61 L.J. Ch. 168.
- (vii.) **Q. B. D.**—*Submission—Staying Proceedings—"Written Agreement"*—*Arbitration Act, 1889, s. 27*.—A policy of fire insurance provided that any differences arising under it should be referred to arbitration. The insured had not signed the policy. *Held*, that an action brought on it by him ought to be stayed, as it was a written agreement to refer, and the plaintiff had, by bringing his action, affirmed the contract to be his.—*Baker v. Yorkshire Fire and Life Assurance Co.*, L.R. [1892] 1 Q.B. 144; 66 L.T. 161.

Attachment:—

- (i.) **Ch. D.—Trustee—Debtors Act, 1878, s. 1.**—A trustee had been ordered to pay into Court moneys received by him under the trust, and failed to do so. It appeared that the trustee had spent the whole of such moneys, acting on the advice of the solicitor and agents of the *cestui-que-trust*, in payment of debts of the *cestui-que-trust* (but other than the debts authorised to be paid), and had received no benefit from such moneys, and that he was without means of repayment. *Held*, that a writ of attachment ought not to be issued.—*Earl of Aylesford v. Earl Poulett*, 40 W.R. 424.

Auctioneer.—See *Trover*, p. 109, iii.

Bailment:—

- (ii.) **Q. B. D.—Injury to Chattel—Negligence of Stranger—Measure of Damages.**—The owner of a horse delivered it to the plaintiff, an auctioneer, for sale, with liberty to use it until sold. Whilst being driven by the plaintiff's servant the horse was frightened by the defendants' steam tramcar, which was being driven too fast, and fell and was injured. The accident happened solely through the defendants' negligence. *Held*, that the plaintiff could not recover damages, being under no liability to the owner of the horse.—*Claridge v. South Staffordshire Tramway Co.*, L.R. [1892] 1 Q.B. 422.

Bankruptcy:—

- (iii.) **C. A.—Appropriation of Salary or Income—Bankruptcy Act, 1883, s. 53, sub-s. 2.**—The bankrupt, an actor, was earning £30 a week under a written agreement with a theatrical manager, whereby the manager agreed to pay him £22 10s. a week while acting in London, and £30 a week while acting in the provinces, subject to deductions when the theatre was not open, or the actor was unable or unwilling to act. The manager was deducting £20 a week from the bankrupt's earnings, under an arrangement by which he had bought up the bankrupt's debts. The bankrupt was also paying £4 a week alimony under an order of the Divorce Division. The registrar ordered the bankrupt to pay to the trustee £15 a week. *Held*, that the bankrupt's earnings were either "salary" or "income," but that under the circumstances the order ought not to have been made.—*E. p. Shine*; *in re Shine*, L.R. [1892] 1 Q.B. 522; 66 L.T. 146; 40 W.R. 386.
- (iv.) **Q. B. D.—Bankruptcy Notice—Judgment Debt—Part Payment—Bankruptcy Act, 1883, s. 4.**—A creditor who has obtained final judgment against a debtor, and has received payment of part of the amount thereof, cannot issue a bankruptcy notice for the whole of the judgment debt, but only for the balance remaining due.—*E. p. Child*; *in re Child*, 66 L.T. 204.
- (v.) **Q. B. D.—Discovery of Debtor's Property—Examination of Witness—Bankruptcy Act, 1883, s. 27.**—A witness summoned by the trustee for the purpose of being examined as to his claim to a certain policy of assurance on the debtor's life, which the debtor had assigned to him shortly before the bankruptcy, objected to being examined on the ground that interpleader proceedings were pending between the trustee and the witness as to the same policy, and that the examination was desired by the trustee with a view to such proceedings. *Held*, that the trustee ought to give the witness notice of the admissions of fact that he required him to make, and that such admissions must be made if they were reasonable.—*E. p. Official Receiver*; *in re Francke*, 66 L.T. 30; 40 W.R. 384.

- (i.) **Q. B. D.**—*Discovery of Debtor's Property—Production of Documents—Servant—Authority—Bankruptcy Act, 1883, s. 27.*—A servant, in whose possession certain documents are alleged to be relating to dealings between his master and the bankrupt, will not be compelled to produce them in the absence of authority from his master to do so.—*E. p. Leicester ; in re Higgs, 66 L.T. 296 ; 40 W.R. 432.*
- (ii.) **Q. B. D.**—*Distress for Rent—Proceeds of—Right to Follow.*—A landlord distrained for rent, and his solicitor received and retained the proceeds of the distress. The tenant became bankrupt, and the trustee obtained an order against the landlord to pay over to him the proceeds of the distress, less the amount which the landlord was entitled to retain under the Bankruptcy Act. The order was not obeyed. *Held*, that he was entitled to a similar order against the solicitor, although he had elected to go against the landlord, as his right of action against the solicitor was not similar to that against the landlord.—*E. p. Collins ; in re Crook, 66 L.T. 29.*
- (iii.) **Q. B. D.**—*Fraudulent Preference—Substitution of Valid for Invalid Bill of Sale.*—The debtor, having given a bill of sale which turned out to be invalid, executed in favour of the holder a second bill of sale in substitution for the previous one. *Held*, that there was no fraudulent preference, the only object being to correct the error in the first bill of sale.—*E. p. Tweedale ; in re Tweedale, 66 L.T. 233.*
- (iv.) **Q. B. D.**—*Petition—Amendment.*—A bankruptcy petition alleged that the debtors had absented themselves from their place of business, but did not allege that such absence was with intent to defeat or delay their creditors. *Held*, that the defect might be remedied by amendment before adjudication.—*In re Fiddian, Squire & Co., 66 L.T. 203.*
- (v.) **C. A.**—*Petition—Form—Two Creditors—Signature by one—Bankruptcy Act, 1883, s. 115.*—A firm of two persons obtained a judgment against the debtor. The firm was afterwards dissolved. Subsequently a petition was presented against the debtor founded on the judgment debt. It purported to be the petition of the two late partners, and was signed by one of them. *Held*, that it was good in form.—*E. p. Hobbs ; in re Hobbs, 66 L.T. 144.*
- (vi.) **Q. B. D.**—*Sale of Property by Trustee to Creditor—Motion by Creditor in name of Trustee to get Possession—Jurisdiction—Bankruptcy Act, 1883, s. 102.*—A trustee in bankruptcy sold to a creditor all his rights to prosecute any proceedings to obtain possession of certain alleged property of the debtor. After the trustee's release, the creditor applied to the county court in the trustee's name to obtain possession. The Judges declined to hear his application. *Held*, that he was right in refusing to exercise his jurisdiction.—*E. p. Official Receiver ; in re Arnold, 66 L.T. 121 ; 40 W.R. 288.*
- (vii.) **Q. B. D.**—*Proof—Loan to Trader—Interest varying with Profits—Postponement—Partnership Law Amendment Act, 1865, ss. 1 and 5.*—A loan of £4,500 was made to a trader under an agreement which provided for the payment half-yearly of a sum of £462 10s. by way of interest, with a proviso that whenever the trader should be unable, through a deficiency of profits, to make such payment, the lender should make a reasonable abatement. *Held*, that the agreement was one by which the lender was to receive a "rate of interest varying with the profits," although the rate of interest varied downwards only, and that the lender's claim must be postponed to the other creditors.—*E. p. Baxter ; in re Vince, 61 L.J. Q.B. 217 ; 66 L.T. 234 ; 40 W.R. 428.*

- (i.) **C. A. & Q. B. D.**—*Solicitor's Costs—Official Receiver Trustee—Authority of Board of Trade.*—When the Official Receiver is trustee without a committee of inspection, and employs a solicitor with the authority of the Board of Trade, no costs can be allowed on taxation beyond the amount limited in the authority given by the Board of Trade.—*E. p. Duncan; in re Duncan* (No. 2), 40 W.R. 320 & 409.
- (ii.) **C. A. & Q. B. D.**—*Trustee—Remuneration—Board of Traffic—Jurisdiction—Bankruptcy Act, 1883, s. 72.*—The Board of Trade has jurisdiction to review the trustee's remuneration, not only when it is fixed by the creditors, but when it is fixed by the committee of inspection to whom the creditors have delegated that matter. *E. p. Harris; in re Gullard*, L.R. [1892] 1 Q.B. 532; 66 L.T. 57; 40 W.R. 385.
- (iii.) **Ch. D.**—*Undischarged Bankrupt—After-acquired Property—Right to Convey—Bankruptcy Act, 1873, ss. 44, 54, 168.*—An undischarged bankrupt cannot, even before the trustee intervenes, convey real estate acquired after the bankruptcy, so as to give a good title against the trustee to a *bonâ fide* purchaser for value without notice of the bankruptcy.—*In re New Land Development Association & James Fagence*, 40 W.R. 295.

See Company, p. 82, iv.

Bastardy :—

- (iv.) **C. A.**—*Service of Summons—Last Place of Abode—Jurisdiction of Justices—Certiorari—Bastardy Laws Amendment Act, 1872, s. 4.*—A bastardy summons must be left at the present place of abode of the defendant, if he has one, and if he has none, then at his last place of abode. If at the time of the service he has his place of abode out of the jurisdiction, the summons cannot be served at all. The High Court can review the decision of the Justices upon the question of service.—*Reg. v. Farmer*, 61 L.J. M.C. 65; 65 L.T. 736; 40 W.R. 228.

Bill of Exchange :—

- (v.) **C. A.**—*Indorsement in Foreign Country—Sale under Judgment—Conflict of Laws.*—Decision of Ch. D. (see Vol. 17, p. 37, v.) affirmed.—*Alcock v. Smith*, L.R. [1892] 1 Ch. 238; 61 L.J. Ch. 161; 66 L.T. 126.

Building Society :—

- (vi.) **C. A.**—*Borrowing—Excess of Power—Secretary—Agent—Liability of Directors.*—Decision of Q. B. D. (see Vol. 17, p. 6, i.) affirmed.—*Cross v. Fisher*, L.R. [1892] 1 Q.B. 467; 40 W.R. 265.

Burials :—

- (vii.) **Q. B. D.**—*Incumbent—Notice to Perform Service—Fees—Non-parishioners—Ecclesiastical Law—Burial Acts, 1852 & 1853—Osborne Morgan's Act (43 & 44 Vict., c. 41).*—No duty rests on a burial board to give notice to the incumbent of the parish to perform the service at burials in the cemetery provided by the burial board under the Burial Act, 1852, or to give him notice under Osborne Morgan's Act that his services are not required, such duty (if any) resting on the friends of the deceased. No fees are payable to the incumbent by the board unless he has actually performed the service or received such notice under Osborne Morgan's Act. The right to grant sepulture to non-parishioners, which the incumbent possessed in respect of the churchyard of the parish, is not preserved to him in respect of the consecrated part of a cemetery provided by the board, and no fees in respect

thereof are payable to him by the board. It is a breach of the ecclesiastical law on the part of a burial board to permit any person to perform the burial service in the consecrated part of their cemetery, unless such person be authorised by the incumbent to do so, and *à fortiori* unless he be a "duly qualified" person.—*Wood v. Headingley Burial Board*, 66 L.T. 90; 40 W.R. 390.

By-Laws.—See *Lease*, p. 90, iv.

Charity:—

- (i.) **Ch. D.**—*Committee of Management—Improperly Constituted—Dismissal of Master.*—The trust deed of a national school provided that it should be managed by a committee, including (among others) the churchwardens, and provided for filling up vacancies by election. It also provided that "no default of election, nor any vacancy during any current year, shall prevent the other members of the committee from acting until the vacancy be filled up." Owing to the poverty of the district and other causes the vacancies were not filled up, and a practice grew up for the sidesmen of the church to attend the meetings of the committee. At a meeting of the committee, at which one of the sidesmen was present, but at which the people's churchwarden was not present, and of which he had received no notice, the plaintiff was dismissed from the office of master of the school. *Held*, that the committee was not duly constituted, owing to the presence of the sidesman, and the absence of and want of notice to the churchwarden, and that the defendants must be restrained from dismissing the plaintiff.—*Lane v. Norman*, 61 L.J. Ch. 149; 66 L.T. 83; 40 W.R. 268.

Colonial Law:—

- (ii.) **P. C.**—*Malta—Primogenitura—Presumption.*—*Held*, with regard to a primogenitura, created in 1702, of certain lands in Malta, that the presumption of law was in favour of its being "regular," so as in each line of descent to admit female in default of male issue of the last holder in that line, in preference to male collaterals descended from a common ancestor.—*Sceberras Trigona v. Sceberras D'Amico*, L.R. [1892] A.C. 69.
- (iii.) **P. C.**—*New South Wales—Insolvency—Validity of Payments—Knowledge of Insolvency.*—By the Act 25 Vict., No. 8, any payment made before sequestration by any person in respect of a debt is to be deemed a valid payment, provided that the creditor, or the person receiving payment on his behalf "shall not at the time of payment have known that the debtor was then insolvent." *Held*, that knowledge of circumstances from which ordinary men of business would conclude that a debtor was unable to meet his liabilities, amounts to knowledge of insolvency within the meaning of the proviso.—*National Bank of Australasia v. Morris*, 66 L.T. 240.
- (iv.) **P. C.**—*Western Pacific—High Commissioner's Court—Jurisdiction—Improper Retention of Land—Damages.*—*Held*, that the Court of the High Commissioner for the Western Pacific had, by virtue of the Order in Council of August 13th, 1877, jurisdiction over (1) a firm consisting of British subjects, who carried on business by their servants and agents in the Western Pacific Islands, though no one of the partners resided, or was to be found in the islands; (2) over British subjects in questions affecting land in the islands not within Her Majesty's dominions. Where the defendant to a suit for the recovery of land wrongfully retained possession after a decree of the Court for the restoration of

the land to the plaintiff; *held*, that he was not on that account disentitled to charge his expenses incurred in managing the land against his receipts from it, and should not be made to pay a sum by way of penal damages in addition to the other damages awarded.—*McArthur v. Cornwall*, L.R. [1892] A.C. 75; 65 L.T. 718.

Company:—

- (i.) **Ch. D.—*Alteration of Memorandum.***—The Court sanctioned the alteration of the memorandum of association so as to include among the objects of the company business of an independent character, but connected with its original business, subject to the name of the company being altered so as to shew the extended nature of its business, and subject to an undertaking not to exercise the extended powers until the present policy-holders had assented thereto, or their policies had expired. Order made that the petition stand over with liberty to mention the change of name.—*In re National Boiler Insurance Co.*, L.R. [1892] 1 Ch. 306; 65 L.T. 849.
- (ii.) **Ch. D.—*Memorandum of Association—Alteration of.***—A company formed for the purpose of investing in Government or Government-guaranteed securities will be allowed, on proper terms, to alter its memorandum of association so as to enable it (1) to borrow or raise money, or secure money already borrowed or raised, by the issue of debentures, debenture stock, or other securities charged on its undertaking, and (2) to extend its investments to specified non-Government securities, if, in the opinion of the Court, the first alteration will enable the company “to carry on its business more economically or more efficiently,” and the investment in the securities mentioned in the second alteration is “a business which, under existing circumstances, may conveniently or advantageously be combined with the business of the company.”—*In re Government Stock Investment Co. (No. 2)*, 40 W.R. 387.
- (iii.) **Ch. D.—*Deed of Settlement—Alteration of.***—A special resolution for the alteration of a deed of settlement will be confirmed by the Court, although the deed of settlement is modified or supplemented by special Acts of Parliament, provided that the proposed alteration does not affect such Acts.—*In re Reversionary Interest Society*, 40 W.R. 339.
- (iv.) **Ch. D.—*Directors—Payment by—Ultra Vires—Following Assets.*** The directors of a company agreed with G. that he should bear the expense of issuing a prospectus, and that if 2,000 shares should be subscribed for before the 30th of April, G. should be paid the sum of £1,000. They also resolved to pay a brokerage on the shares placed. Only a small number of shares were applied for under the prospectus issued by G., but a substantial number were placed under a second prospectus issued after the 30th of April. The directors paid G. the sum of £1,000 and also a sum of £221 for brokerage. *Held*, that both payments were *ultra vires*, and received by G. with knowledge that they were so, and that the amounts must be repaid by G.—*West of England Paper Mills Co. v. Gilbert*, 61 L.J. Ch. 92.
- (v.) **Ch. D.—*Debentures—Floating Security—Restriction on Power to create Lien—Solicitor's Lien.***—A company issued mortgage debentures, purporting to be a first charge on all its property, and providing that “the charge hereby created is to be a floating security, but so that the corporation is not to be at liberty to create any mortgages or charge in priority to the said debentures.” *Held*, that the restriction imposed on the power to charge the property of the company did not apply to a charge or lien given by the general law and arising from the company carrying on its business in the ordinary course, and did not therefore

interfere with the lien of the company's solicitor on the papers of the company in his possession.—*Brunton v. Electrical Engineering Corporation*, 65 L.T. 745.

- (i.) **C. A.**—*Directors—Powers of Borrowing.*—Decision of Ch. D. (*see* Vol. 17, p. 7, iii.) affirmed.—*Masonic & General Life Assurance Co. v. Sharpe*, L.R. [1892] 1 Ch. 154; 65 L.T. 806; 40 W.R. 241.
- (ii.) **Ch. D.**—*Directors—Qualification—Fees.*—A. and M. agreed to join the board of directors of a company on the faith of an agreement with the directors that they should not be required to increase their holdings of shares, which were not a sufficient qualification according to the articles, and that an alteration of the articles should be proposed which would make their holdings a sufficient qualification. They acted as directors, and received fees. The directors had, by the articles, power to do all acts which the company might do. The company was afterwards wound up. *Held*, that the company had power to resolve not to insist, for a limited time, that the directors should not act till they had acquired their qualification, that the directors had therefore power to request A. and M. to act, pending the determination by the company of the question of their qualification, and that A. and M. had duly acted as directors, and were entitled to their fees.—*In re International Cable Co.*; *e. p. Official Liquidator*, 66 L.T. 253.
- (iii.) **Ch. D.**—*Qualification Shares—Contract to take.*—When a person accepts and acts in the office of director of a company, an agreement will be implied between him and the company that he will serve on the terms as to qualification and otherwise contained in the articles, and that he shall receive all the benefits provided for therein. The articles of a company provided that the qualification of a director should be the holding of 100 shares, and that a first director might act before acquiring his qualification, but should in that case acquire it within one month, and that unless he should do so he should be deemed to have agreed to take the said shares, and the same should be allotted to him. I. was a first director of the company, and P. had been subsequently appointed in pursuance of the articles. They both accepted and acted, but neither of them applied for shares, nor were any shares allotted to them. The company was wound-up. *Held*, that they should be placed on the list of contributories in respect of 100 shares each.—*In re Anglo-Austrian Printing and Publishing Co.*; *e. p. Sir Henry Isaacs*; *e. p. Kegan Paul*, 66 L.T. 250; 40 W.R. 362.
- (iv.) **Ch. D.**—*Profits—Increase or Decrease in Value of Capital Assets.*—In estimating the profits of a year, in order to determine whether a dividend ought to be paid, the increase or decrease in the capital assets need not be taken into account; and the fact that a company has, in a previous year, credited its profit and loss account with a sum representing the estimated increase in value of certain of its assets, does not make it binding on that company, in a subsequent year, to debit the profit and loss account with an alleged diminution in the value of such assets.—*Bolton v. Natal Land and Colonisation Co.*, 65 L.T. 786.
- (v.) **Ch. D.**—*Prospectus—Misrepresentation—Right to Rescind Contract to take Shares.*—The prospectus of a company was sent to K., and he applied for shares before the company was registered. After registration the company allotted shares to K. The prospectus contained misrepresentations. *Held*, that the prospectus not having been issued by the company or its agents, K. was not entitled to rescind his contract on the ground of the misrepresentations, and that the company could not be held to have adopted the prospectus by allotting the

shares to K., there being, as between K. and the company, no connection between his application and the prospectus.—*In re Metropolitan Coal Consumers' Association; Karberg's Case*, 66 L.T. 184.

- (i.) **Ch. D.**—*Prospectus—Misrepresentation*.—In an action for rescission on the ground of misrepresentation in a prospectus, the prospectus must be regarded as a whole, and with the same mind as that with which a would-be investor would approach it when invited to embark his money in the enterprise.—*Scott v. Synder Dynamite Projectile Co.*, 66 L.T. 278.
- (ii.) **P. C.**—*Lien on Shares—Discharge of*.—A company had by its articles a lien on any shares registered in the name of a debtor to the company. W., being indebted to the company, and being the registered owner of a large number of shares, entered into an agreement empowering the company to sell certain of such shares in discharge of such debt. *Held*, that the company did not thereby relinquish its lien on such of W.'s shares as were not included in the agreement.—*Bank of Africa v. Salisbury Gold Mining Co.*, 66 L.T. 237.
- (iii.) **Ch. D.**—*Shares—Fully Paid-up—Registration—Seal—Delivery—Contemporaneous Filing—Companies Act, 1867, s. 25*.—F., one of the promoters of a company, signed the memorandum for twenty shares, which were allotted to him as fully paid-up. *Held*, in the winding-up, that in default of proof by F. that he had paid for them in cash, he must be placed on the list of contributories in respect thereof. By agreement, dated the 21st of January, the company agreed to allot to each promoter seventy fully paid-up shares. The company was not registered till the 25th of January. *Held*, that before that date there was no agreement within the Act. The seal of the company was affixed to the agreement on the 25th of January, and the agreement was filed on the next day. *Held*, that the agreement must be considered as having been delivered on the 25th of January, and that the delivery and filing were contemporaneous, and that F. ought not to be placed on the list with respect of the seventy shares.—*In re Anglo-Colonial Syndicate*, 65 L.T. 847.
- (iv.) **Ch. D.**—*Shares—Acceptance—Contract—Registration—Companies Act, 1867, s. 25*.—On October 3rd, 1889, the directors of a company resolved that "9,242 shares be and are hereby allotted to the following, being nominees of the vendor." R.'s name was in the list as allottee of ten shares. The secretary wrote to R. informing him that ten fully paid-up shares had been allotted to him. R. made no reply. *Held*, that he did not thereby accept the allotment. The agreement under which these shares were to be issued was not filed, and no shares were issued under the allotment. On October 28th, 1889, an agreement was made between the company and the vendor for the issue to the vendor or his nominees of 60,000 fully paid-up shares, and this agreement was filed. The previous allotment was then cancelled, and the shares were re-allotted to the vendor and his nominees, including R. *Held*, that the contract of October 28th was a sufficient contract in writing, and that the shares being issued after that date must be regarded as fully paid-up.—*In re Staffordshire Gas and Coke Co.; Rushworth's Case*, 66 L.T. 48.
- (v.) **Ch. D.**—*Winding-up—Debenture Holder's Action—Receiver—Liquidator—Custody of Books, &c.*—As between the receiver and manager in a debenture holder's action and the liquidator in a winding-up, the latter is entitled to the custody of all the books, papers, &c., although the former is in possession of them under the order appointing him receiver.—*Engel v. South Metropolitan Brewing & Bottling Co.*, L.B. [1892] 1 Ch. 442; 66 L.T. 155; 40 W.R. 282.

- (i.) **Ch. D.—Winding-up—Official Liquidator—List of Contributors.**—The Official Receiver, when acting provisionally as liquidator after an order for compulsory winding-up, has power to settle the list of contributors.—*In re English Bank of the River Plate*, L.R. [1892] 1 Ch. 391; 66 L.T. 177; 40 W.R. 325.
- (ii.) **Ch. D.—Winding-up—Petitioner in Arrear of Payment of Calls—Suspension of Business.**—The Court has discretion to hear a shareholder's winding-up petition, although the petitioner is in arrear of payment of calls. The Court is not bound to make a winding-up order in the case of suspension of business or absence of substratum.—*In re Crystal Reef Gold Mining Co.*, L.R. [1892] 1 Ch. 408; 66 L.T. 111; 40 W.R. 235.
- (iii.) **Ch. D.—Winding-up—Secured Creditor—Realisation—Proof for Balance—Interest—Bankruptcy Act, 1883, s. 9, sub-ss. 2, 168; Schedule 2, r. 9.**—A company was in liquidation. At the commencement of the winding-up certain hotels belonging to it were mortgaged. The mortgagees sued to enforce their security, and obtained the appointment of a receiver, who carried on the business and made profits. The property comprised in the security was gradually sold, and the proceeds paid to the mortgagees, who applied them in keeping down the interest, and then in reduction of the principal. The assets having been all realised, there was a balance owing to the mortgagees. *Held*, that they were only entitled to prove for the balance due to them at the date of the winding-up after deducting the net amount realised, but that they were entitled to set off the profits made since the winding-up against the interest accrued since the same period.—*In re London, Windsor and Greenwich Hotels Co.; Quartermaine's Claim*, 66 L.T. 19; 40 W.R. 298.
- (iv.) **Q. B. D.—Winding-up—Set-off—Mutual Dealings—Bankruptcy Act, 1883, s. 38.**—The defendant in 1879 effected with the plaintiffs two policies of £1,000 each on his own life, the moneys assured to be payable to the defendant if he should be alive on May 7th, 1888. In 1887 the defendant obtained loans from the plaintiffs on mortgage of the policies. In August, 1887, a petition was presented to wind-up the plaintiff company. The defendant paid the premiums till May 7th, 1888, and did not receive the policy moneys. A winding-up order was made in July, 1889; and subsequently an arrangement was sanctioned by the Court (to which the defendant did not assent) providing that the holders of policies of the plaintiff company should, in satisfaction of all claims of the plaintiff company, accept certain reduced payments from the S. company. The plaintiffs sued the defendant to recover the amount of the loans, and the defendant claimed to set-off against their claim the amounts which, but for the winding-up, would have been payable to him upon the policies. *Held*, that he was entitled to the set-off.—*Sovereign Life Assurance Co. v. Dodd*, L.R. [1892] 1 Q.B. 405.
- (v.) **C. A.—Winding-up—Transfer of Proceedings to County Court—Companies (Winding-up) Act, 1890, ss. 3, 10.**—The voluntary liquidator of a company obtained an *ex parte* order from a chief clerk in chambers in the Chancery Division for an examination into the conduct of a manager of the company, and subsequently obtained an *ex parte* order from the same chief clerk transferring the proceedings under the first order to the County Court. The County Court Judge refused to hear the matter. *Held*, that there was jurisdiction to transfer the proceedings, and that even if the first order ought not to have been made by a chief clerk, the validity of such order could not be questioned in the County Court, but only on an appeal against, or motion to set aside, the order.—*Reg. v. East Stonehouse Judge*, 65 L.T. 730.
- See Mortgage*, p. 95, ii.

Conflict of Laws:—

- (i.) **C. A.**—*Scotch Judicial Process—Charges—Notice—Priority.*—Decision of Ch. D. (see Vol. 16, p. 77, vi.) affirmed.—*In re Queensland Mercantile and Agency Co.; s. p. Australasian Investment Co.*, L.R. [1892] 1 Ch. 219; 61 L.J. Ch. 145.

Conspiracy:—

- (ii.) **H. L.**—*Trade Combination.*—Decision of C. A. (see Vol. 15, p. 6, i.) affirmed.—*Mogul Steamship Co. v. McGregor*, L.R. [1892] A.C. 25; 66 L.T. 1; 40 W.R. 337.

Consular Courts:—

- (iii.) **P. C.**—*Rights of Judge—Power to Dismiss Vexatious Action.*—The Judge of a Consular Court, not being a Court of Record, but established by virtue of a treaty, and vested with plenary civil jurisdiction over all British subjects within the limits of the territory in which it exists, is entitled, while sitting and acting as Judge of that Court, to the same degree of protection as is accorded to the Judge of a Court of Record. A Court of competent jurisdiction has inherent power to dismiss, without proof, actions which it holds to be vexatious. Therefore, where the Judge of a Consular Court, without hearing evidence, dismissed an action on the ground that he considered it vexatious, *held*, that no action would lie against him.—*Haggard v. Pelicier*, L.R. [1892] A.C. 61; 65 L.T. 769.

Conversion:—

- (iv.) **Ch. D.**—*Land Devised on Trust for Sale—Partial Failure—Reconversion.*—Where land is devised upon trust for sale and conversion into personalty to be held upon trusts, some of which ultimately fail, the proceeds of sale, and the land (if any) still unsold at the time of such failure go to the heir, and both as personal estate.—*Scales v. Heyhoe*, L.R. [1892] 1 Ch. 379; 66 L.T. 174; 40 W.R. 233.
See Will, p. 111, ii.

Copyright:—

- (v.) **Ch. D.**—*Casts of Fruit and Foliage.*—Casts of fruit and foliage are included in 54 Geo. 3, c. 56, s. 1.—*Caproni v. Alberti*, 65 L.T. 785; 40 W.R. 235.

Costs:—

- (vi.) **Ch. D.**—*Motion to Restrain Infringement—Innocent Defendant—Small Dealing.* Where a retail dealer has innocently purchased a small quantity of goods, which are in fact labelled or marked with an infringement of a registered trade-mark, and has submitted himself to the order of the Court without contesting the action, the Court will not necessarily order him to pay the costs of the action.—*American Tobacco Co. v. Guest*, 66 L.T. 257; 40 W.R. 364.

County Council:—

- (vii.) **Q. B. D.**—*Licence—Refusal by Licensing Committee—Application to Council—Opposition by Councillors—Bias.*—A County Council, in determining whether a music-hall licence is or is not to be renewed, must decide judicially and in accordance with the principles on which justice is administered. Therefore, where certain Councillors who had instructed counsel to oppose an application for a renewal sat on the Council, though they did not vote or take an active part in the

proceedings, *held*, that the Council had not heard and determined the application according to law.—*Reg. v. London County Council*, L.R. [1892] 1 Q.B. 190; 61 L.J. M.C. 75; 66 L.T. 168; 40 W.R. 285.

County Court:—

- (i.) **Q. B. D.**—*Jurisdiction—Question of Title—Easement—County Courts Act, 1888, ss. 56 & 60.*—In a County Court action for damage done to the plaintiff's oyster-bed by the defendant's barge, the plaintiff gave evidence of fourteen years' possession of the oyster-bed. The defendant gave him notice to produce his documents of title, and cross-examined him as to his title, but did not produce evidence to contradict it. The value of the bed exceeded £50 a year. *Held*, that there was no question of title within the meaning of sect. 56, and that the word "easement" in sect. 60 does not apply to the user of navigable water by the public, and that the County Court had jurisdiction.—*Hawkins v. Rutter*, 61 L.J. Q.B. 146; 40 W.R. 238.

See Company, p. 82, v.

Criminal Law:—

- (ii) **C. C. R.**—*Attempt to Commit Felony—Evidence.*—In order to prove an attempt to commit a felony, it is not necessary to prove that a felony could have been committed had the attempt not been frustrated.—*Reg. v. Ring*, 66 L.T. 300.
- (iii.) **C. C. R.**—*Unlawful Assembly—Acts likely to lead to Breach of Peace—Ignorance as to Effect.*—The marching of nine men, carrying musical instruments, on a Sunday, through a town, in which processions accompanied by instrumental music are prohibited from taking place on Sunday, is not evidence of an unlawful assembly, although such marching is calculated to and does excite others to commit a breach of the peace, if such men did not know that their acts were calculated to lead to a breach of the peace. *Quære*, whether where two or more persons are assembled in pursuit of a common object lawful in itself, and in the carrying out of such object do something which may lead to a breach of the peace, such assembly does not amount at common law to an unlawful assembly.—*Reg. v. Clarkson*, 66 L.T. 297.
- (iv.) **Q. B. D.**—*Practice—Cambridge University—Vice-Chancellor's Court—Charter of University.*—D. H. was arrested at Cambridge by the University constables, and was charged before the Vice-Chancellor with "walking with a member of the University." The charge was read over to her, and she pleaded "not guilty." Evidence was given of her walking with a member of the University, and of her being a woman of bad character. She was committed for fourteen days, the warrant stating that she had been charged with and convicted of "walking with a member of the University." This was a common form used for a long time in the Vice-Chancellor's Court when it is intended to charge a woman with walking with such a member "for immoral purposes," and it was intended so to charge and convict D. H., and so to enter the conviction on the warrant. *Held*, that the proceedings were irregular; that D. H. had not been charged within the words of the charter as "suspected of evil"; that she had been charged with an offence not within the jurisdiction of the Vice-Chancellor; that she had not been charged with any other offence, nor had the charge been altered or amended, and, consequently, that the conviction was bad.—*In re Daisy Hopkins*, 66 L.T. 53.

See Evidence, p. 86, ii.

Damages :—

- (i.) **C. A.**—*Measure of—Breach of Contract—Notice of Special Circumstances.*—The defendants contracted to load on board their ship lying in the docks of the plaintiffs goods which were to come by railway, the goods to be alongside by a day named. The plaintiffs agreed with the dock company that the latter should haul the trucks containing the goods alongside the ship at the rate of 3s. per ton. In consequence of the defendants' delay in loading the plaintiffs had to pay demurrage for the trucks. If the plaintiffs had contracted for the haulage of the trucks at the dock company's usual rates, they would have been entitled to have the goods warehoused for three weeks, in which time they were actually loaded. In an action to recover the demurrage, the defendants contended that they had no notice that the trucks were to be hauled on special conditions and not on the usual terms, under which no demurrage would have been incurred. *Held*, however, that the defendants were liable, because the demurrage was the natural result of the defendants' breach of contract, and the plaintiffs were not bound to protect them by hauling the goods on any special terms.—*Welch, Perrin & Co. v. Anderson & Co.*, 61 L.J. Q.B. 167.

Deed :—

- (ii.) **C. A.**—*Construction—Reservation or Regrant—Minerals—Licence to Work—Exclusive.*—Decision of Ch. D. (see Vol. 17, p. 43, ii.) affirmed.—*Duke of Sutherland v. Heathcote*, 66 L.T. 210.

Ecclesiastical Law :—

- (iii.) **Archbishop of Canterbury.**—*Nomination—Roman Catholic—13 Anne, c. 13.*—By the statutes of a college it was provided that the heir for the time being of X. should have the perpetual right of nominating to the college for presentation to the rectory of B., within three months of such rectory being vacant, a person qualified as therein specified. The heir of X., who was a Roman Catholic, nominated a person to the college for presentation on the occasion of a vacancy. *Held*, that the nomination was void.—*Boyer v. Bishop of Norwich*, L.R. [1892], P. 41.
See Burials, p. 77, vii.

Elementary Education :—

- (iv.) **Q. B. D.**—*Non-Attendance—Penalty—Distress Warrant—Discretion—Summary Jurisdiction Act, 1879, s. 21.*—Justices may in their discretion refuse to issue distress warrants against the goods of defendants fined for the non-attendance of their children at a Board School, without affirmative evidence that the defendants possess goods *prima facie* distrainable.—*Reg. v. German*, 61 L.J. M.C. 43; 66 L.T. 264.

Estate par autre vie :—

- (v.) **Ch. D.**—*Special Occupant—Dower.*—Real and personal estate was settled by will, subject to a life estate, to the use of A. for life, remainder to the use of his second and subsequently born sons in tail male, remainder to the use of his first son in tail male, with remainders over. X., his only son, executed a disentailing deed, barring his own estate tail and all subsequent remainders, and limiting the real estate to himself in fee, and the personal estate to himself absolutely. A. became tenant for life in 1883, subject to a name and arms clause in the will contained. His life estate determined on his non-compliance

therewith, and thereupon X. became entitled to an equitable estate during his life, determinable on the birth of a second son, which event never happened. X. died intestate, leaving a widow, and leaving A. his heir-at-law and administrator. *Held*, that A. took the rents and profits of the real estate as special occupant, and the income of the personalty as administrator of X.; and that such income formed part of the personal estate of X.; and that, as the interposition of the estates tail which might come into existence severed X.'s equitable interest in possession from his estate of inheritance in remainder, X. had no interest equal to an estate of inheritance in possession, and therefore that his widow was not entitled to dower.—*Moore v. Moore*, 40 W.R. 375.

Estoppel.—*See* Pledge, p. 96, iv.

Evidence:—

- (i.) **C. C. R.**—*Affirmation—Grounds of Objection to Oath—Duty of Judge—Oaths Act, 1888, s. 1.*—The judge, before permitting a witness to affirm, ought to inquire into the grounds of his objection to being sworn, and to ascertain whether he objects because he has no religious belief, or because the taking of an oath is contrary to his religious belief. The objection to the admissibility of the evidence of a witness who has been allowed to affirm without being so questioned, may, in a criminal trial, be taken after verdict.—*Reg. v. Moore*. 61 L.J. Q.B. 80; 66 L.T. 125; 40 W.R. 304.
- (ii.) **C. C. R.**—*Joint Indictment—Aiding and Abetting—Statements by one Prisoner in absence of the other—Inference by Jury—Motion to Quash Counts in Indictment.*—Upon the trial of an indictment in which two persons were charged, the one, a bankrupt, with disposing of goods with intent to defraud his creditors; the other, his brother-in-law and manager, with aiding and abetting him therein: *held*, that statements made by the bankrupt when he obtained the goods were admissible as evidence against both prisoners, though made in the absence of the other prisoner: *held* also, that the jury might infer from the relationship between the prisoners, that the prisoner who received the goods from the bankrupt, and was charged with aiding and abetting, was aware when he received the goods that they had not been paid for. *Seemle*, that where it is intended to take objection to any of the counts of an indictment, the proper course is to move to have them struck out before plea pleaded, and that it is too late to take such an objection after the close of the case for the prosecution.—*Reg. v. Chapple & Bolingbroke*, 66 L.T. 124.

Executor:—

- (iii.) **Ch.**—*Power to Appropriate Specific Assets to Legatees.*—An executor may, even though no express power is given by the will, appropriate any specific part of the estate to a legatee. An executor, who had no special power for that purpose, agreed with one of the residuary legatees to appropriate a mortgage to him as part of his share, and handed him the mortgage deed, but did not execute a transfer of the mortgage. The mortgage debt did not then exceed the legatee's estimated share in the residue, but by reason of the loss of some of the assets, the residuary estate was reduced, and the other residuary legatees could not be paid in full. *Held*, that the appropriation was complete, and that the legatee could not be deprived of his mortgage.—*Dowsett v. Culver*, L.R. [1892] 1 Ch. 210; 61 L.J. Ch. 153.

Fishery :—

- (i.) **H. L.**—*Grant of—Copy of Court Roll.*—*Quere*, whether a right of several fishery, which is appurtenant to a manor, may be granted by copy of Court Roll, although the right be not exercisable within the ambit of the manor.—*Attorney-General v. Emerson*, 61 L.J. Q.B. 79.

Friendly Society :—

- (ii.) **Q. B. D.**—*Dissolution—Chief Registrar—Appeal—County Court—Friendly Societies Act, 1875, s. 25, sub-ss. (7) (d), (8) (d), (e), s. 38—Treasury Regulations.*—An award, made by the Chief Registrar of Friendly Societies, dissolving a friendly society is final and conclusive as regards the merits; and there is no appeal from it by a member of the society on the ground that an insufficient sum has been awarded to him as his share of the funds. Proceedings may be taken to set aside an award on grounds outside the merits. *Quere*, whether such proceedings may be taken in a County Court. *Quere*, whether the Treasury Regulations, 1888, by which forms are prescribed for use in such proceedings, are not *ultra vires*.—*Wilnot v. Grace*, 66 L.T. 287; 40 W.R. 350.

Husband and Wife :—

- (iii.) **P. D.**—*Divorce—Husband's Petition—Insanity of Wife.*—To a husband's petition for divorce on the ground of his wife's adultery, a plea of insanity was raised. *Held*, that though she might have been subject to insane delusions at the time of the adultery, yet if she was capable of appreciating the nature of the act, and its probable consequences, her insanity was no defence. *Quere*, whether such insanity as would entitle a defendant to an acquittal on a criminal charge, would constitute a valid defence to a suit for divorce.—*Yarrow v. Yarrow*, L.R. [1892] P. 92.
- (iv.) **P. D.**—*Divorce—Wife's Petition—Cruelty not Found—Judicial Separation.*—On a petition by a wife for divorce, on the ground of her husband's adultery and cruelty, the jury found that he had committed adultery, but had not been guilty of cruelty. The wife had deserted her husband before his adultery. *Held*, that the petition might be converted into one for judicial separation, and that the wife's desertion of her husband did not bar the granting of a decree of judicial separation.—*Duplany v. Duplany*, L.R. [1892] P. 53; 66 L.T. 267.
- (v.) **P. D.**—*Divorce—Variation of Settlements—Cross-examination of Petitioner.*—A wife who has been divorced for adultery is not disentitled from cross-examining her husband as to his means on his application for variation of the settlements.—*Driffeld v. Driffeld*, 65 L.T. 795.
- (vi.) **P. D.**—*Judicial Separation—Wife's Costs.*—The Court will not refuse to make the "usual order" for a wife's costs, unless her solicitor has been guilty of improper conduct in the institution or prosecution of the suit. Therefore, the order was made on the dismissal of a wife's petition for judicial separation on the ground of cruelty, although the Court considered her charges to be "trumpery," there being no reason to charge her solicitor with improper conduct, and her own separate income being trifling.—*Aires v. Aires*, 65 L.T. 859.
- (vii.) **P. D.**—*Protection Order—Misrepresentation—Notice.*—A husband, in 1867, went to America, with his wife's consent, to seek employment. He did not communicate with her during his absence, except by a verbal message, which she was not proved to have received. About ten years afterwards he returned, and went to his wife's house, but she refused to receive him. She then obtained a protection order on the ground of desertion in 1867. She did not inform the magistrate

that her husband had offered to resume co-habitation, nor that he had left her in possession of a furnished lodging-house, by which she earned her living. No notice was given to the husband of the application, and he did not know of the existence of the order till after the wife's death. *Held*, that the order must be taken to have been obtained by false statements, by concealment of material facts, and without notice to the husband, and was therefore invalid, and must be set aside.—*Mahoney v. M'Carthy*, L.R. [1892] P. 21.

- (i.) **P. D.**—*Restitution of Conjugal Rights—Non-compliance—Removal of Property—Injunction Refused.*—The Court refused, upon an *ex parte* application by a husband who had obtained a decree for the restitution of conjugal rights, to restrain the wife, who had failed to comply with the decree, from removing certain property out of the country, pending the obtaining by the petitioner of a sequestration which it was stated he intended to apply for.—*Wallis v. Wallis*, 65 L.T. 796.

Industrial Society:—

- (ii.) **C. A.**—*Application of Profits—"Lawful Purpose."*—Decision of Q. B. D. (see Vol. 17, p. 46, iv.) affirmed.—*Warburton v. Huddersfield Industrial Society*, 40 W.R. 346.
- (iii.) **Ch. D.**—*Winding Up—Jurisdiction.*—A society registered under the Industrial and Provident Societies Acts is not a company within the meaning of the Companies Acts, and must be wound up by the County Court, and not by the High Court. The Companies Act, 1890, does not extend the jurisdiction of the High Court in this respect.—*In re London v. Suburban Bank*, 40 W.R. 326.

Infant:—

- (iv.) **Ch. D.**—*Guardian—Appointment by Mother—Guardianship of Infants' Act, 1886, s. 3, sub-s. 2, s. 13.*—The provisional appointment by a mother, during the lifetime of the father, of guardians of her infant child after her death, should be, in form, an appointment of guardians to act "jointly with the father"; and on an application to the Court, after her death to confirm the appointment, the Court can make an order under the Act in that form only; though under its general jurisdiction the Court might displace the father altogether. A mother by will appointed "so far as she might be able" two guardians of her infant daughter, the guardians not being expressed to be appointed "jointly with the father," pursuant to the statutory power. *Held*, that the appointment, though wrong in form, must be treated as having been intended to be made under the statutory power; and the Court confirmed the appointment "jointly with the father," being satisfied that he was "unfitted to be sole guardian."—*In re G. (an Infant)*, L.E. [1892] 1 Ch. 292.

Insurance:—

- (v.) **Q. B. D.**—*Fire—Condition Requiring Arbitration—Charge of Fraud.*—A clause in a fire insurance policy providing that the liability of the company and the amount of such liability in respect of any claim should be referred to arbitration, and that the award of the arbitrators should be a condition precedent to any liability of the company or any right of action against the company in respect of such claim, is a good condition precedent, and no action can be maintained against the company till after arbitration and award; and it makes no difference that a charge of fraud has been made against the assured.—*Trainor v. Phoenix Fire Assurance Company*, 68 L.T. 825.

- (i.) **C. A.**—*Life—Policy for Benefit of Wife—Murder by Wife.*—Decision of Q. B. D. (See Vol. 17, p. 14, vii.) reversed.—*Cleaver v. Mutual Reserve Fund Association*, L.R. [1892] 1 Q.B. 147; 61 L.T. Q.B. 128; 66 L.T. 220; 40 W.R. 230.
- (ii.) **Ch. D.**—*Life—Benefit of Wife and Children—Joint Tenants—Married Women's Property Act, 1870, s. 10.*—A. took out a policy of insurance on his life for the benefit of his wife and children. A. died leaving a widow and five children. *Held*, that the widow and children took the policy moneys as joint tenants.—*In re Davies' Policy Trusts*, L.R. [1892] 1 Ch. 90; 66 L.T. 104.

Jury:—

- (iii.) **Q. B. D.**—*Coroners—Exemption from Service—Solicitor's Managing Clerk—6 Geo. IV., c. 50, ss. 2, 52—Juries' Act, 1870, s. 9.*—A solicitor's managing clerk is exempt from service on a coroner's jury.—*In re Dutton*, L.R. [1892] 1 Q.B. 486; *Reg. v. Dutton*, 61 L.J. Q.B. 190; 40 W.R. 270.

Justices:—

- (iv.) **Q. B. D.**—*Disqualification—Bias—Salmon Fishery Act, 1865, s. 61.*—A justice who was a member of the Board of Conservators of a fishery district, was present at a meeting of the Board where it was unanimously resolved to take proceedings against a person for violation of certain provisions of the Salmon Fishery Act, 1865. He sat on the bench to hear the charge, and the alleged offender was convicted. *Held*, that he was disqualified, and that the conviction must be quashed.—*Reg. v. Henley*, L.R. [1892] 1 Q.B. 504; 40 W.R. 383.
- (v.) **Q. B. D.**—*Disqualifying Interest—Ratepayers' Highway Act.*—A Justice of the Peace, at a vestry meeting, moved a resolution that S. should be called on to remove an alleged nuisance left by the side of the highway. He afterwards adjudicated on a summons against S., and directed that the matter in question, being soil and compost, should be sold, and the proceeds applied to the repair of the highway. *Held*, that he was disqualified, both on account of the part he had taken at the vestry meeting, and also because he was pecuniarily interested as a ratepayer in the result of the order.—*Reg. v. Gaisford*, L.R. [1892] 1 Q.B. 381; 61 L.J. M.C. 60; 66 L.T. 24.
- (vi.) **Q. B. D.**—*Practice—Two Offences in One Information—Amendment—Jervis's Act, s. 1—Time.*—Where two offences are charged in one information the magistrate ought to allow the information to be amended by striking out one charge, and to proceed to hear the remaining charge, and such charge is to be considered as dating from the time when it was originally made, not from the date of the amendment.—*Rodgers v. Richards*, L.R. [1892] 1 Q.B. 555; 66 L.T. 261; 40 W.R. 381.

See Elementary Education, p. 85, iv.

Landlord and Tenant:—

- (vii.) **Ch. D.**—*Lease of Farm—Market Gardening—Glasshouses—Waste.*—A lease was granted of a farm near London, in a district where there were many market gardens, with a covenant on the part of the tenant to cultivate "in a good, proper, and husband-like manner," according to the best rules of husbandry practised in the neighbourhood. *Held*, that it was not "waste" on the part of the tenant to use part of the farm as a market garden, and to erect glasshouses thereon for the cultivation of hot-house produce.—*Meus v. Cogley*, 66 L.T. 86.

- (i.) **C. A.**—*Tithe Rent Charge—Deduction from Rent—Tithe Commutation Act, 1836, s. 80.*—A tenant who has paid tithe rent-charge can deduct the amount so paid only from the rent which becomes due next after such payment.—*Dawes v. Thomas*, L.R. [1892] 1 Q. B. 414; 40 W.R. 305. See Mortgage, p. 95, ii.

Lands Clauses Act:—

- (ii.) **Q. B. D.**—*Costs of Assessing Compensation*—"Lands which shall have been taken"—Verdict for less than "sum previously offered."—The promoters gave notice to treat for A.'s land. They then, under sect. 85, sealed a bond and delivered it to A., and made a deposit, but did not enter on the land. A. gave the promoters notice to summon a jury. The promoters then offered a sum as compensation, and on the offer being declined, issued their warrant to the sheriff to summon a jury to assess the compensation, and gave notice to A. of the inquiry. The jury assessed the compensation at less than the sum previously offered by the promoters. *Held*, that as the promoters had not actually entered on the land the proceedings were not regulated by sect. 68, but by sect. 88; and that, consequently, the offer of compensation, not having been included in the notice of inquiry as required by that section, was bad, and that A.'s right to costs was not affected by sect. 51.—*Reg. v. Manley Smith*, 40 W.R. 333.
- (iii.) **C. A.**—8 & 9 Vict., c. 18, ss. 95, 96, 97—*Compensation—Copyhold.*—Decision of Ch. D. (see Vol. 17, p. 16, iv.) reversed.—*Louther v. Caledonian Railway*, L.R. [1892] 1 Ch. 73; 61 L.J. Ch. 103; 66 L.T. 62; 41 W.R. 225. See Lease, p. 90, iv.

Lease:—

- (iv.) **Q. B. D.**—*Covenant to "repair and keep up"*—Power to pull down and Re-build—Compulsory Sale—Terms of Compensation—By-Law—Power to Disregard.—A lessee, under covenant to repair and keep up the premises, was required by a local board to sell part of the land on which the premises stood. He proposed to pull down the premises and to re-erect them on plans sanctioned by the local board, but which were in contravention of their by-laws. The amount of compensation was referred to an arbitrator. *Held*, in answer to questions stated by him, that there being no negative covenant in the lease, the lessee was entitled to pull down and re-build the premises; but that he would not be entitled to build on any plans in contravention of the by-laws, even though they had been sanctioned by the local board, and that the arbitrator could not take any such plans into consideration. *Semble*, that a local board, with power to make by-laws, has no power to dispense with by-laws properly made.—*In re McIntosh and The Pontypridd Improvements Co.*, 61 L.J. Q.B. 164.

Libel:—

- (v.) **Ch. D.**—*Interlocutory Injunction.*—The defendants published placards and circulars alleging that there was a strike at the plaintiffs' works against the sweating system, and that work was not properly done there. On a motion for an interlocutory injunction to restrain such publications the defendants entered into evidence in support of their defence, and the Court found that the statements that there was a strike at the plaintiffs' works were untrue; that the term "sweating" could not fairly be applied to their system, and that the allegation that the work was not properly done there was untrue. *Held*, that an interlocutory injunction should be granted.—*Collard v. Marshall*, 66 L.T. 248.

Licensing :—

- (i.) **C. A.**—*Beerhouse—Refusal to Renew—Ground not Stated in Objection—Quarter Sessions—Refusal on Ground Stated in Objection—Licensing Act, 1872, s. 42—Wine and Beerhouse Act, 1869, ss. 8, 19.*—Decision of Q. B. D. (see Vol. 17, p. 48, iv.) affirmed.—*Whiffen v. Malling Justices*, L.R. [1892] 1 Q.B. 362; 61 L.J. M.C. 82; 40 W.R. 293.
- (ii.) **Q. B. D.**—*Beerhouse Licensed on May 1, 1869—Refusal of Renewal—Grounds—Wine and Beerhouse Act, 1869, ss. 8, 19.*—When justices refuse an application for the licence of a beerhouse, which was licensed on May 1, 1869, and has been continuously licensed since then, they must state their grounds at the time of refusing, and if they do not do so, they will be ordered by *mandamus* to hear and determine the application.—*Reg. v. Thomas*, L.R. [1892] 1 Q.B. 426; 66 L.T. 289.
- (iii.) **Q. B. D.**—*Sale during prohibited Hours—Wholesale.*—A grocer, holding a wholesale but not a retail beer-dealers' licence, sold during prohibited hours beer in casks, containing four and a-half gallons each. *Held*, that as he was entitled to sell such quantities by wholesale, he did not come within the Licensing Acts.—*Reg. v. Jenkins*, 61 L.J. M.C. 57; 65 L.T. 856; 40 W.R. 318.

Limitations :—

- (iv.) **C. A.**—*Bankruptcy Motion—Money Belonging to Bankrupt's Estate—Application for Payment by Trustee.*—A trustee in a liquidation applied by motion in the Bankruptcy Court for an order that N. should pay to him certain rents of the debtor's property which had been received by him subsequently to the commencement of the liquidation. The notice of motion was served more than six years after the rents had been so received. *Held*, that the motion was barred by the Statute of Limitations.—*E. p. Norton; in re Mansell*, 66 L.T. 245.
- (v.) **Q. B. D.**—*"Judgment"—Real Property Limitation Act, 1874, s. 8.*—No action on a judgment may be brought after the lapse of twelve years, although the judgment, not having been followed by execution on land, is not a charge on the lands of the judgment debtor.—*Hebblethwaite v. Peever*, L.R. [1892] 1 Q.B. 124; 40 W.R. 318.
- (vi.) **C. A.**—*Promissory Note—Assignment—Part Payment to First Holder—Acknowledgment.*—Decision of Q. B. D. (see Vol. 17, p. 49, iii.) affirmed.—*Stamford, Spalding & Boston Banking Co. v. Smith*, 40 W.R. 355.

Local Government :—

- (vii.) **Q. B. D.**—*General District Rate—"Land used only as a Railway"—Tramway—Public Health Act, 1875, s. 211, sub-s. 1 (b).*—The appellants, under Parliamentary powers, constructed a tramway, connected by points and switches with a railway in their possession, which was worked by them in conjunction with the tramway, and which had been constructed under an Act of Parliament. *Held*, that the tramway was not "used only as a railway," and that the appellants were not entitled to be rated in respect of it in the proportion of one-fourth part only of its net annual value.—*Swansea Improvements & Tramway Co. v. Swansea Urban Sanitary Authority*, L.R. [1892] 1 Q.B. 357; 66 L.T. 119; 40 W.R. 283.
- (viii.) **Q. B. D.**—*Local Act—Urinal in Front of Public-House—Power of Vestry to Direct Alterations.*—A vestry was empowered by a Local Act to direct owners and occupiers of public-houses to make structural alterations in urinals placed in front of their public-houses and abutting on the street. *Held*, that a urinal placed in the side wall of a

public-house, and forming part of the house, but communicating with the street only by an open door flush with the wall of the house, was not placed in front of the house; and that the vestry had no power to direct the occupier to make structural alterations in the urinal.—*Wellstead v. Vestry of Paddington*, 66 L.T. 194; 40 W.R. 254.

Lunatic:—

- (i.) **C. A.**—*Contract by Lunatic before Lunacy—Vesting Order—Lunacy Act*, 1890, s. 135.—P. contracted to sell his premises and business to T. and G. for £5,585; £2,535 to be paid at once, and £3,050 at the end of five years. The first sum was duly paid, and possession was given. P., who resided abroad, was found a lunatic abroad, and a curator was appointed, with authority to receive the £3,050. *Held*, on the petition of T. and G. and the curator, that an order could be made vesting the leaseholds in T. and G., the order to be dated and drawn up after the payment of the £3,050 to the curator.—*In re Pagant*, L.R. [1892] 1 Ch. 236; 66 L.T. 244.
- (ii.) **C. A.**—*Costs of Inquiry—Lunacy Act*, 1890, ss. 90, 94, 98, 109.—A husband petitioned for an inquiry into the mental condition of his wife, who was found on inquiry to be of sound mind. The Court was of opinion that there were good grounds for inquiry, and that the petitioner had acted *bonâ fide* in the interests of his wife, but that his conduct had excited great hostility in her, thereby probably causing extra expense. The costs were large, and the petitioner would be almost ruined if obliged to pay his own costs. *Held*, that his costs should be taxed as between party and party, and that two-thirds thereof should be paid out of a fund, part of the wife's estate, in which he claimed an interest, which claim he waived so far as was necessary.—*In re Cathcart*, 61 L.J. Ch. 99; 66 L.T. 9; 40 W.R. 257.
- (iii.) **C. A.**—*Estate under £200—County Court—Stock at Bank—Lunacy Act*, 1890, ss. 132, 133.—Decision of Q. B. D. (*see* Vol. 17, p. 50, iii.) affirmed.—*In re Noyce*, 40 W.R. 371.
- (iv.) **C. A.**—*Practice—Order for Attendance for Medical Examination—Disobedience—Attachment—Jurisdiction—Lunacy Act*, 1890, s. 99—*Lunacy Act*, 1891, s. 26, sub-s. 2, s. 9, *Schedule*.—A master in lunacy has jurisdiction to issue a writ of attachment for disobedience to an order made by him for the attendance of the alleged lunatic for medical examination. But in ordinary cases, applications for attachment should be made to the Lords Justices in open Court.—*Re B.* (No. 2), 66 L.T. 38; 40 W.R. 369.
- (v.) **C. A.**—*Sale of Real Estate—Consideration—Perpetual—Rent Charge—Lunacy Act*, 1890, ss. 117, 120.—The Court has power to sanction the sale of a lunatic's real estate in consideration of a perpetual rent charge, and will exercise that power if satisfied that such a sale will be beneficial.—*In re Ware*, L.R. [1892] 1 Ch. 344.
- (vi.) **C. A.**—*Trustee—Vesting Order—Reduction of Number—Lunacy Act*, 1890, ss. 135, 136—*Conveyancing Act*, 1881, s. 32.—Where one of four trustees of a will had been found lunatic, the Court made an order vesting his estate in the other three, although the number of trustees was thereby diminished.—*In re Leon*, L.R. [1892] 1 Ch. 348.

Mandamus:—

- (vii.) **C. A.**—*Drainage Commissioners—Judgment Against—Rate to Satisfy*.—Commissioners were appointed by special Act to establish and maintain drainage works. The costs of establishing the works were to be borne by the owners, and the costs of maintenance by the occupiers of the

lands affected. The amount to be expended in establishing the works was limited to £15,000. Rates were to be levied on owners and occupiers, to meet the costs of establishment and maintenance, and "of carrying out the objects of the Act." An owner of land not affected by the works recovered damages against the Commissioners for damage done to his land by negligence in carrying out the works. The Commissioners had expended the whole of the £15,000, and had no goods on which execution could be levied. *Held*, that they had power to levy a rate to satisfy the judgment, and ought to be compelled by mandamus to do so.—*Gallsworthy v. Selby Dam Commissioners*, L.R. [1892] 1 Q.B. 348; *Reg. v. Selby Dam Commissioners*, 66 L.T. 17.

Margarine:—

- (i.) **Q. B. D.**—*Exposure for Sale—Margarine Act, 1887, s. 6.*—The words "exposed for sale" are not limited to such an exposure as would enable purchasers to see the margarine itself, but margarine, when wrapped in paper so as to be invisible to the purchaser, may be "exposed for sale" within the meaning of the Act.—*Wheat v. Brown* L.R. [1892] 1 Q.B. 418; 61 L.J., M.C. 94.

Marriage Settlement:—

- (ii.) **Ch. D.**—*Infant—Covenant to Settle After-Acquired Property—Repudiation—Election—Restraint on Anticipation.*—By a marriage settlement, the wife being an infant, and the settlement not being sanctioned by the Court, property belonging to both parties was settled with successive life estates for the husband and wife, with remainder to the children. The wife's life estate in the husband's property was without power of anticipation during any coverture, and her life estate in her own property was without power of anticipation during the joint lives of husband and wife. There was a covenant to settle the wife's after-acquired property. There was issue of the marriage. The husband obtained a *decree nisi* for divorce. The wife, who was entitled to reversionary interests, brought an action for a declaration that the covenant to settle after-acquired property was not binding on her. The decree was afterwards made absolute, and the wife married again. *Held*, that she was not bound by the covenant, but must elect whether she would take against the settlement so far as related to her reversionary property; and that, if she elected so to take, her interests under the settlement must be applied to make compensation to the persons disappointed by such election, except as to her life interest in the husband's property during her present coverture, and as to her life interest in her own property so long as she should be under her present coverture and her first husband should be living, with respect to which she was not bound to elect, the same being subject to the restraint on anticipation.—*Hamilton v. Hamilton*, L.R. [1892] 1 Ch. 396; 66 L.T. 112; 40 W.R. 312.

Master and Servant:—

- (iii.) **Q. B. D.**—"Defect in Condition of Works"—*Employers' Liability Act, 1880, s. 1, sub-s. (1).*—The defendant was engaged in pulling down an old house. After part of the house had been pulled down, he ordered the plaintiff, one of his labourers, to remove some rubbish from near a wall, which was still standing. The wall fell, owing to the defendant's neglect to shore it up, and injured the plaintiff. *Held*, that the dangerous condition of the wall was a "defect in the condition of the works connected with or used in the business" of the defendant, and that he was liable in damages.—*Brannigan v. Robinson*, L.R. [1892] 1 Q.B. 344; 61 L.J. Q.B. 202.

- (i.) **Q. B. D.**—*Employers' Liability Act, 1880, s. 1, sub-s. 1*—"Way."
—The plaintiff, a workman in the defendants' service, while crossing, in the course of his employment, a yard in their works, fell into a well, which was uncovered, and was injured. The yard contained a large quantity of plant. *Held*, that it was not a "way" within the meaning of the Act, not being set apart or provided for use as a passage.—*Willems v. Watt*, 66 L.T. 185; 40 W.R. 237.

Metropolis Management:—

- (ii.) **Q. B. D.**—*New Street—Excavation—Power of District Board to Prohibit—Metropolis Management Amendment Act, 1890, s. 6.*—Where a new street is being laid out on land on which no excavation has taken place, the vestry or district board has no power absolutely to prohibit excavation to a greater extent than that allowed by the following saving clause—viz., "Provided that this section shall not apply where no more sand, gravel, or subsoil has been or is intended to be excavated, removed, or taken away than is necessary to level or form a foundation for the paving, metalling, or flagging of any street, road, passage, or way." The vestry or district board can, however, impose conditions as to the levelling and making a proper foundation for the street.—*Wandsworth District Board v. Bird*, L.R. [1892] 1 Q.B. 481.
- (iii.) **Q. B. D.**—*Streets—Laying Out—Communication.*—A private Act provided that no road which would not directly communicate at both ends with a public carriage way should be laid out as a public carriage way without the consent of the London County Council. *Held*, that a road which was intended to lead out of a street, and after going round some distance to return to the same street, was not within the prohibition.—*London County Council v. Edmondson*, 66 L.T. 200.
- (iv.) **Q. B. D.**—*Vestry—Action Against—Notice—Locality Incorrectly Described—Metropolitan Local Management Act, 1862, s. 106.*—The plaintiff in an action against a vestry stated in his notice of action that the cause of action arose in S. Street, it having in fact arisen in N. Road, at a point twenty feet from the junction of N. Road and S. Street. *Held*, that the notice was good.—*Madden v. Kensington Vestry*, 40 W.R. 390.

Mortgage:—

- (v.) **Ch. D.**—*Action for Redemption—Sale out of Court by Mortgagor—Conveyancing Act, 1881, s. 25.*—Immediately prior to the power of sale under a first mortgage becoming exercisable, the mortgagor commenced proceedings for redemption, and gave notice of motion for an order for sale. The second mortgagee consented. The first mortgagee had taken no steps to exercise his power. *Held*, that the mortgagor should have leave to sell out of Court within three months, after which the mortgagee's power of sale was to revive, the mortgagor to make a deposit to cover the costs of sale, and to pay the purchase money into Court, a reserve price to be fixed sufficient to cover the mortgage.—*Brewer v. Square*, 40 W.R. 378.
- (vi.) **Ch. D.**—*Equitable—Deposit of Deeds—Redemption—Notice.*—In the case of an equitable mortgage by deposit of title-deeds, no time being fixed for redemption, the mortgagee is not entitled to six months' notice of redemption, or to interest in lieu of notice; but he is entitled to a reasonable time to look up the deeds.—*Fitzgerald's Trustee v. Mellersh*, L.R. [1892] 1 Ch. 385; 66 L.T. 178; 40 W.R. 251.

- (i.) **C. A.—Hotel—Equitable—Receiver and Manager.**—C. being tenant under a building agreement of land on which he was to build an hotel, by a written agreement charged the building agreement, "and all the premises comprised therein, and the hotel and buildings to be hereafter erected," with the payment to M. of a sum of money, and agreed to procure a lease of the "premises, hotel, and buildings," and to execute a mortgage to M. "of the premises contained in such lease," such mortgage to contain "such powers, covenants, and provisions as the solicitor or counsel of the said M. shall advise or require." C. erected the hotel and carried on business there. No formal mortgage was executed. M. commenced an action for foreclosure or sale, and moved for a receiver of the rents and a manager of the business. *Held*, that the business was not expressly or by implication included in the security, and that M. was not entitled to have a manager of the business appointed.—*Whitley v. Challis*, L.R. [1892] 1 Ch. 64; 65 L.T. 838; 40 W.R. 291.
- (ii.) **Ch. D.—Leaseholds—Tenant's Fixtures—Payment by Instalment—Property in Vendor—Distraint for Rent.**—The defendants mortgaged to the plaintiffs a leasehold colliery, with all the plant, &c., except such as came within the definition of personal chattels in the Bills of Sale Act, 1878, which was assigned absolutely. The L. Co. agreed with the defendants to erect some plant, not within such definition, at the colliery; payment to be by instalments, and until full payment the plant to be the property of the vendors. The mortgagees sued for foreclosure, and obtained a receiver. The defendants went into voluntary liquidation on March 14th, 1891, and the winding-up was continued under supervision. The plant supplied by the L. Co. was not fully paid for, and the L. Co. moved for leave to remove it. Summons by the lessor for leave to distrain for arrears of rent. Summons by the plaintiffs that the receiver might vacate the premises and remove all the defendants' chattels and fixtures. *Held*, that the L. Co. might remove their plant. *Held*, also, that the landlord must be refused leave to distrain, with leave to prove for arrears of rent before March 14th, 1891, the plaintiffs submitting to pay rent from that day to December 31st; and that the receiver might give up possession, and (as between him and the lessor) might remove all chattels and fixtures.—*Cumberland Union Banking Co. v. Maryport Hematite Iron and Steel Co.*, L.R. [1892] 1 Ch. 415; 66 L.T. 108; 40 W.R. 280.
- (iii.) **H. L.—Exclusion of Right to Redeem—Validity.**—Decision of C. A. (*see* Vol. 16, p. 15, iv.) affirmed.—*Salt v. Marquis of Northampton*, L.R. [1892] A.C. 1; 61 L.J.M. 49; 65 L.T. 765.

See Practice, p. 100, iii. Vendor and Purchaser, p. 109, vi.

Partnership :—

- (iv.) **Ch. D.—Dissolution—Receiver—Arbitration Act, 1889, s. 4.**—In an action for dissolution of partnership, the Court has power to appoint a receiver, and will exercise that jurisdiction on good cause shewn, notwithstanding a clause in the articles for the reference of all disputes to arbitration. It has also jurisdiction to order all proceedings to be stayed except for the purpose of carrying out the order for a receiver.—*Pini v. Roncoroni*, 66 L.T. 255; 40 W.R. 297.
- (v.) **Q. B. D.—Sale or Pledge of Business.**—W., who was insolvent, assigned all his machinery, stock-in-trade, book debts, &c., to B., his largest creditor. B. agreed to carry on the business in the name of W., and engaged W. as manager at a salary. B. agreed to find funds to carry on the business, and to discharge all the existing and future trade liabilities of W. All profits were to be placed to the credit of W.,

and when the losses were made up, B. was to reassign the business to W. without any consideration. The business was carried on at a loss, and B. became bankrupt. W., who admitted that he was B.'s servant, was discharged, and the assets sold. W. afterwards became bankrupt. *Held*, that the agreement created a partnership between B. and W., and that the proceeds of sale of the assets were distributable among their joint creditors.—*E. p. D. Smith & Co.; in re Whiteley*, 66 L.T. 291.

Patent:—

- (i.) **C. A.**—*Action to Restrain Threats—General Circular—Patents, &c., Act, 1888, s. 32.*—The defendant sent out in the boxes which contained his goods a circular as follows: "Notice to grocers and others,—Information of extensive violation of Mr. William Edge's patent rights has been received. All parties are warned not to infringe those rights." These notices were received by several customers of the plaintiff, who manufactured the same goods, but were not received by the plaintiff personally. The plaintiff sued to restrain the defendant. *Held*, that the notices were a "threat," and that the plaintiff was entitled to an inquiry as to damages, the defendant undertaking to discontinue the notices.—*Johnson v. Edge*, 66 L.T. 44.
- (ii.) **Ch. D.**—*Amendment—Condition Imposed—Written Assent to—Action Pending—Effect of—Patents, &c., Act, 1888, s. 18, sub-s. 10.*—C., a patentee, applied for leave to amend his specification. A. opposed, and leave was given by the Comptroller to amend subject to the condition that C. should not sue A. for infringement committed prior to 1884. The condition was assented to by C.'s agent. The Comptroller's formal decision was given on 9th June, 1890. C. issued his writ against A. for infringement on 11th June. Subsequently C., at the demand of the Patent Office, gave a written undertaking not to sue A. according to the condition. The specification was then formally amended. *Held*, that the amended specification could be admitted in evidence, because the proceedings for amendment terminated when leave was given to amend, and that the giving of written assent to the condition imposed was not a step the taking of which is prohibited while an action is pending.—*Andrew & Co. v. Crossley & Co.*, 66 L.T. 105.

Penalty:—

- (iii.) **C. A.**—*Contract—Liquidated Damages—Sum payable in one event only.*—A contract for the construction of works provided that the works should be completed in all respects, and cleared of all implements, &c., by a certain date; and, in default of such completion, that the contractor should pay the sum of £100, and £5 for every seven days during which the works should be incomplete after the said date, as and for liquidated damages. *Held*, that the sums were payable on a single event only, namely, on non-completion of the works, and were therefore to be regarded as liquidated damages, and not as penalties.—*Law v. Local Board for Redditch*, L.R. [1892] 1 Q.B. 127; 61 L.J. Q.B. 172; 66 L.T. 76.

Pledge:—

- (iv.) **Ch. D.**—*Inscribed Stock—Transfer of—Notice of Pledger's Title.*—The plaintiff, in consideration of an advance, executed a transfer of inscribed stock and memorandum of charge to S. The stock was subsequently transferred by S., at the request of I., who was the plaintiff's broker, and acted with his authority, to the defendants. They advanced a larger sum than that advanced by S., and had no notice of the existence

of the plaintiff, or of the charge in favour of S. I. subsequently sold the stock and received the proceeds, and the defendants, at his request, transferred the stock to the purchasers. *Held*, that the plaintiff was estopped by his negligence from claiming to redeem the stock.—*Marshall v. National Provincial Bank of England*, 40 W.R. 328.

Poor Law :—

- (i.) **Q. B. D.**—*Settlement—Children under Sixteen—Divided Parishes Act*, 1876, s. 35.—In an inquiry into the settlement of three children under sixteen, it appeared that their father, who was born before 1876, had not acquired a settlement for himself, and that his derivative settlement (if any) was that of his grandfather, his father not having acquired a settlement. *Held*, that the father and his three children were settled in the parish in which he was born.—*Guardians of Bath Union v. Guardians of Berwick-on-Tweed Union*, 66 L.T. 258; 40 W.R. 417.
- (ii.) **Q. B. D.**—*Settlement—"Parish"—Bristol—Divided Parishes Act*, 1876 ss. 34, 44.—The parishes comprised in the Bristol Incorporation of the Poor form a "parish" for the purpose of settlement, so that a pauper who has resided for two years in one of such parishes, and for one year in another, has obtained a legal settlement within the said Incorporation by residence for three years.—*The Guardians of the Bristol Incorporation of the Poor v. The Guardians of Barton Regis Union*, 66 L.T. 190.

Power :—

- (iii.) **C. A.**—*Release of—Benefit of Donee—Right to Transfer of Fund.*—Decision of Ch. D. (See Vol. 16, p. 130, iv.) reversed. *Held*, that the father was entitled to have a moiety of the fund transferred to him on executing a surrender of his life interest.—*Radcliffe v. Bewes*, L.R. [1892] 1 Ch. 227; 61 L.J. Ch. 186; 40 W.R. 323.

Practice :—

- (iv.) **Ch. D.**—*Administration—Person having Liberty to Attend—Relief against—Jurisdiction—R.S.C.*, 1883, O. xvi., r. 40.—In an ordinary administration action there is no jurisdiction to make an order against a person who is not a party to the action, but has obtained leave to attend the proceedings, for delivering up of title deeds relating to the estate.—*Simpson v. Parkes*, 66 L.T. 151.
- (v.) **C. A.**—*Appeal—Action tried before Official Referee—Application for New Trial.*—Where an application has been made to the Divisional Court for a new trial in an action tried before an official referee under section 14 of the Arbitration Act, 1889, an appeal lies without leave from the decision of the Divisional Court.—*Munday v. Norton*, L.R. [1892] 1 Q.B. 403; 66 L.T. 173; 40 W.R. 355.
- (vi.) **P. D.**—*Appeal from County Court—Ship—County Courts Admiralty Jurisdiction Act*, 1868, s. 31—*County Courts Act*, 1888, s. 120.—In an Admiralty action for breach of charter-party brought in a County Court, the judge made a decree for nominal damages, to wit, 1s., and costs. *Held*, that the plaintiffs might appeal to the Divisional Court of the Admiralty Division of the High Court.—*The Eden*, L.R. [1892] P. 67; 40 W.R. 415.
- (vii.) **C. A. & Q. B. D.**—*Appeal—Housing of the Working Classes Act*, 1890, Sched. II., s. 26 (a)—*Refusal of Judge to give Leave to submit Question to a Jury.*—Where a party being dissatisfied with the amount of the compensation ascertained by an award under the Act has applied to a

judge at chambers for leave to submit the question of the proper amount of compensation to a jury, and the judge has refused to give leave, there is no appeal from such refusal.—*E. p. Stevenson; in re Housing of the Working Classes Act, 1890, L.R. [1892] 1 Q.B. 394; 40 W.R. 417.*

- (i.) **C. A.**—*Appeal*—"Criminal Cause or Matter"—*Metropolitan Building Act, 1855, ss. 19, 45, 46, 47.*—The decision of the Queen's Bench Division, on a case stated by a magistrate for the opinion of the Court, as to whether a certain roof was or was not of a combustible material, within the meaning of the Metropolitan Building Act, 1855, is a "judgment in a criminal cause or matter," and cannot be appealed from.—*Payne v. Wright, 66 L.T. 148.*
- (ii.) **Ch. D.**—*Costs—Payment out—Petition—Summons—Service.*—Funds in Court, amounting in all to upwards of £80,000, had been paid in by various public bodies in respect of charity land, situate in the City of London, which had been taken by compulsory powers. The Charity Commissioners had, under the powers of the City of London Parochial Charities Act, 1883, made a scheme for the administration of the funds, and such scheme was binding on the several corporations or public bodies, in whose names the funds were standing. The commissioners petitioned for payment out of the funds, and served the petition on the several corporations or public bodies, thirty-two in number. Some of the sums in Court amounted to less than £1,000. *Held*, that the thirty-two corporations or public bodies being bound by the scheme, the service on them was unnecessary, and that the costs of such service should be disallowed. *Held*, also, that the Commissioners had exercised a proper discretion in proceeding by petition and not by summons, and that the costs ought not to be limited to those which would have been incurred on summonses.—*In re Rector and Churchwardens of St. Alban's, Wood Street, 66 L.T. 51.*
- (iii.) **P. D.**—*Costs—Refreshers—R.S.C., 1883, O. lxx., par. 48.*—The discretion of the Registrar in taxation between party and party to allow refresher fees to counsel, is only modified by the rules of the Supreme Court to the extent that he is not to allow any refresher unless the hearing of the case has been substantially prolonged beyond five hours.—*The Courier, 40 W.R. 336.*
- (iv.) **C. A.**—*County Court—Appeal from—New Trial—County Courts Act, 1888, s. 120.*—Decision of Q. B. D. (*see Vol. 17, p. 23, vii.*) affirmed.—*How v. L.N.W.R., L.R. [1892] 1 Q.B. 319; 40 W.R. 292.*
- (v.) **P. D.**—*Commission to examine Witnesses—Foreign Tribunal—Injunction.*—In proceedings for divorce on the ground of the wife's adultery, the co-respondent filed an act or petition denying the jurisdiction of the Court. The petitioners had obtained a commission for examination of witnesses in Vienna, which was suspended, pending the hearing of the act on petition. In the meantime he took proceedings in Vienna to have the witnesses summoned before the Austrian Court to be examined on oath. *Held*, that he must be restrained from prosecuting such proceedings.—*Armstrong v. Armstrong, L.R. [1892] P. 98.*
- (vi.) **C. A.**—"Criminal Cause or Matter"—*False Measures—Mandamus—Weights and Measures Act, 1878, s. 25.*—The decision of the Queen's Bench Division discharging a rule nisi for a mandamus to compel justices to hear a summons against a person for being in possession of false or unjust measures, is a decision in a "criminal cause or matter" in respect of which there is no appeal.—*Reg. v. Young, 61 L.J. M.C. 42; 66 L.T. 16.*

- (i.) **Q. B. D.**—*Discontinuance—Costs—Jurisdiction—R.S.C., 1883, O. xxvi., r. 1; O. xxv., r. 4; O. lxv., r. 1.*—Upon an application by the plaintiff for leave to discontinue an action in which the defence was admitted, the judge ordered that all proceedings be stayed, each party to pay his own costs, except such costs of the defendant as, in the taxing master's opinion, were caused by any proceedings unnecessarily taken by the plaintiff, which the plaintiff was to pay. *Held*, that there was jurisdiction to make the order.—*Musman v. Boret*, 66 L.T. 171; 40 W.R. 352.
- (ii.) **Q. B. D.**—*Discovery—Infant.*—An infant plaintiff cannot be ordered to make discovery of documents.—*Curtis v. Mundy*, 40 W.R. 317.
- (iii.) **P. D.**—*Discovery—Divorce.*—In a husband's suit for divorce, the wife made several counter-charges. The Court ordered her to file an affidavit and give discovery of documents, limited to her counter-charges other than that of adultery.—*Schoolcraft v. Schoolcraft*, 65 L.T. 794.
- (iv.) **P. D.**—*Divorce—Alimony Pendente Lite—Insufficiency of Answer—Partnership Accounts.*—In an application for alimony *pendente lite* the wife is entitled to have the clear oath of the husband as to the net profits of his business, but the Court will not, except in a very strong case, compel him to disclose partnership accounts.—*Tonge v. Tonge*, L.R. [1892] P. 51.
- (v.) **P. D.**—*Divorce—Intervener—Decree Absolute—Variation of Settlements—Title of Suit.*—A wife petitioned for divorce on the ground of her husband's cruelty and adultery with A. and others. A. obtained leave to intervene, and her name was added to the title of the suit. A. obtained an order for a commission to examine witnesses, and for a postponement of the trial of the issues affecting her till the return of the commission. The petitioner obtained a decree absolute, on the ground of her husband's adultery with other women, and the issue affecting A. was never tried. *Held*, on a petition for variation of settlements, that A.'s name must be struck out of all pending and future proceedings.—*Connemara v. Connemara*, L.R. [1892] P. 102.
- (vi.) **P. D.**—*Divorce—Petition—Adultery—Charge of.*—A petition for divorce must specifically allege adultery; and an allegation of bigamy will not be held to infer one of adultery.—*Bonaparte v. Bonaparte*, 65 L.T. 795.
- (vii.) **Q. B. D.**—*Garnishee Order—Mistake—Setting Aside Order.*—Where a garnishee order has been made absolute, owing to the mutual mistake of the garnishee and the judgment creditor, the garnishee is entitled to have the order set aside, and the money paid under it refunded.—*Moore v. Peachey*, 66 L.T. 198.
- (viii.) **C. A.**—*Judgment—Charging Order—Beneficial Ownership—1 & 2 Vict., c. 110, s. 14.*—A judgment creditor cannot obtain a charging order on shares standing in the name of the judgment debtor, where the debtor is merely trustee of such shares, which have been transferred into his name solely to qualify him for the position of director.—*Cooper v. Griffin*, 40 W.R. 420.
- (ix.) **Q. B. D.**—*Justices—Appeal from—Notice—Summary Jurisdiction Act, 1879, s. 31, sub-s. 2.*—The notice of appeal to quarter sessions from the decision of a Court of Summary Jurisdiction, which must be served on the clerk of such Court, need not be addressed to the justices whose decision is appealed against.—*Reg. v. Essex Justices*, L.R. [1892] 1 Q.B. 490.

- (i.) **P. D.**—*Motion for Attachment—Endorsement on Order—R.S.C.*, 1883, O. xli., r. 5.—An order was made on an executor to take probate within a certain time, and was disobeyed. Motion for attachment for disobedience refused, the order not having been duly endorsed.—*In the Goods of Bristow*, 66 L.T. 60.
- (ii.) **Ch. D.**—*Mortgage—Foreclosure—Parties—Representation.*—The trustees and executors of the will of a deceased mortgagor sufficiently represent the estate of the mortgagor for all the purposes of a foreclosure action, and the *cestui-que-trust* need not be brought before the Court.—*Wavell v. Mitchell*, 65 L.T. 851.
- (iii.) **Ch. D.**—*Foreclosure—Sale out of Court—Reserved Biddings and Auctioneer's Remuneration Fixed by Judge—R.S.C.*, 1883, O. li., r. 1A.—In a foreclosure action an order was made for sale by the plaintiffs out of Court of the mortgaged property, but the reserved biddings and the auctioneer's remuneration were to be fixed by the Judge, and the proceeds of sale were to be paid into Court by the plaintiffs. The order was pre-faced by a declaration that the Court was satisfied by the evidence that all persons interested in the estate were before the Court.—*Cumberland Union Banking Co. v. Maryport Hematite Iron and Steel Co.*, L.R. [1892] 1 Ch. 92; 66 L.T. 103.
- (iv.) **Q. B. D.**—*Payment into Court with Denial of Liability—Costs—County Court—R.S.C.*, 1883, O. xxii., r. 6A.—*County Courts Act*, 1888, ss. 107, 164—*County Court Rules*, 1889, O. ix., rr. 12, 17A.—When the defendant in a County Court action pays money into Court with a denial of liability, and the plaintiff does not take the money out, but proceeds with the action, and recovers no more than the amount paid in, the defendant is entitled to the costs of the action. The practice of the High Court is to be followed in County Courts, where there is nothing inconsistent therewith in the County Court rules.—*Wood v. Leatham*, 61 L.J. Q.B. 215.
- (v.) **Q. B. D.**—*Pleading—Recovery of Land—Claim as Heir-at-Law—Particulars—R.S.C.*, 1883, O. xix., r. 7.—In an action for the recovery of land, the statement of claim alleged that the plaintiff was entitled as heir-at-law of B., who died seised. Held, that the defendant was entitled, as of course, to particulars shewing the links of relationship on which the plaintiff relied as constituting him such heir.—*Palmer v. Palmer*, [1892] 1 Q.B. 319.
- (vi.) **P. D.**—*Probate—Costs—Contentious Rules of 1862, Rule 41.*—Where the party opposing a will has given notice that he merely insists on the will being proved in solemn form and only intends to cross-examine the witnesses, the Court has no power to condemn him in costs, such power only existing when the party giving the notice has taken proceedings to call in the probate.—*Leigh v. Green*, L.R. [1892] P. 17.
- (vii.) **P. D.**—*Probate—Interrogatories—Probate Act*, 1857, s. 26.—Leave given to the executors named in a will to interrogate the solicitor of the testator touching a memorandum which the solicitor had informed the executors the testator had executed in reference to his property.—*In the goods of Lockwood*, 66 L.T. 124.
- (viii.) **C. A.**—*Receiver—Remuneration—Trustee.*—There is no inflexible rule that a trustee can only be appointed receiver on the terms of having no remuneration. A testator directed his trustees, of whom S. was one, to allow S. to carry on his business, and to receive one-fourth of the net profits, not to exceed £800 a year. In an administration action inquiries were directed as to the business, and S. was appointed receiver

and manager without security, no remuneration being mentioned. About fifteen months afterwards S. resigned her office. The profits during her receivership were very small. The judge allowed her remuneration at the rate of £400 a year. *Held*, that the fact that the judgment did not mention remuneration was not a decision that she should not receive any, and that the discretion of the judge as to her remuneration should not be interfered with.—*Bignell v. Chapman*, L.R. [1892] 1 Ch. 59; 66 L.T. 36; 40 W.R. 305.

- (i.) **Q. B. D.**—*Reference—Matter Requiring "Scientific" or Local Investigation—Allegation of Fraud—Arbitration Act, 1889, s. 14.*—The defendant, in an action for money due for work done under a contract, pleaded that the work had not been done to the satisfaction of his architect, the terms of the contract being that the plaintiff should be paid only on the completion of the work to the satisfaction of the defendant and his architect, whose decision was to be final and binding. The defendant also counter-claimed for defective work. The plaintiff alleged, in reply, that the architect had, unfairly and improperly and in collusion with the defendant, refused to say that he was satisfied. The plaintiff afterwards obtained an order for reference. *Held*, that the order ought not to have been made, because the plaintiff's allegation was one of fraud, which could be tried separately, and which the defendant was entitled to have tried by a jury.—*Russell & Co. v. Harris*, 65 L.T. 752.
- (ii.) **C. A.**—*Security for Costs—Action by Foreigner—R.S.C., 1883, O., xv., r. 6 (a).*—The words "temporarily resident within the jurisdiction" have an elastic meaning, the object of the rule mentioned being to cover a case in which a foreigner ordinarily resident out of the jurisdiction would not be here when he was wanted.—*Michiels v. The Empire Palace*, 66 L.T. 132.
- (iii.) **Q. B. D.**—*Service—Scotch Corporation—Office in England—Service on Official—Railway Clauses Act, 1845, s. 135.*—The defendants were a Scotch Corporation, owning six miles of railway in England, and having a station at Carlisle, which was their principal office in England. In an English action brought against them for false imprisonment, which occurred in Scotland, the writ was served on their traffic manager at Carlisle. *Held*, that the traffic manager was a head officer who could be properly served, that Carlisle was one of the principal offices, and that the service was good.—*Palmer v. Caledonian Railway*, 40 W.R. 365.
- (iv.) **P. D.**—*Ship—Costs—Higher Scale—R.S.C., 1883, lxx., r. 9.*—Where the nature of the defence made it necessary to call engineers and surveyors on both sides, who produced plans in support of their respective views, *held*, that the plaintiffs, being successful, were entitled to costs on the higher scale.—*The Robin*, L.R. [1892] P. 95.
- (v.) **P. D.**—*Ship—Salvage—Amendment of Indorsement of Writ—Costs.*—In an action in rem. for salvage, the writ was indorsed with a claim for £5,000, and the owners undertook to put in bail for that amount. The statement of claim claimed, in the usual form, "such an amount of salvage as to the Court may deem just." The Court awarded £7,500. *Held*, on motion by the plaintiffs, before the decree was drawn up, that the indorsement of the writ should be amended by altering the amount named to £8,500, the plaintiffs to pay the costs of the motion.—*The Dictator*, L.R. [1892] P. 64.
- (vi.) **Q. B. D.**—*Specially Indorsed Writ—Claim for Interest—Liquidated Demand—R.S.C., 1883, O. iii., r. 6; O. xiv., r. 1.*—Judgment can be summarily signed only where the defendant has appeared to a specially

indorsed writ, and such a writ is applicable only where the plaintiff's demand is liquidated, that is, if interest is claimed, to cases in which interest is payable under the contract, and not by way of unliquidated damages. Interest cannot be claimed on a specially indorsed writ, unless it is due by contract, and unless a definite sum is claimed in respect thereof. A statement of claim demanding interest, but shewing no liability to pay it, is defective. A claim for interest from the date of the writ till payment or judgment is an essential part of the writ; and such a claim, to be capable of being made on a specially indorsed writ, must fulfil the requirements of a special indorsement as above stated.—*Sheba Gold Mining Co. v. Trubshawe, Ryley and Master*, 61 L.J. Q.B. 219; 66 L.T. 228; 40 W.R. 381.

- (i.) **C. A.**—*Writ—Special Indorsement—Interest—R.S.C.*, 1883, O. iii., r. 6; O. xiv., r. 1.—Where an indorsement on a writ, after claiming a liquidated sum, also claims interest in the nature of unliquidated damages, such indorsement is not a good special indorsement.—*Wilks v. Wood*, 40 W.R. 418.
- (ii.) **Q. B. D.**—*Writ—Special Indorsement—Interest—Bills of Exchange Act*, 1882, s. 57—*R.S.C.*, 1883, O. iii., r. 6; O. xiv., r. 1; O. xxxvi., r. 58.—In an action on a promissory note, the specially indorsed writ contained a claim for interest to payment or judgment. *Held*, that this was a good special indorsement.—*London & Universal Bank v. Earl of Clancarty*, 40 W.R. 411.
- (iii.) **C. A.**—*Writ—Special Indorsement—Bill of Exchange—Interest and Noting Expenses—Bill of Exchange Act*, 1882, s. 57—*R.S.C.*, 1883, O. iii., r. 6; O. xiv., r. 1.—The indorsement on a writ in an action on a bill of exchange which claims the expenses of noting and interest from the date of the writ till payment, is a good special indorsement.—*Lawrence v. Willcocks*, 40 W.R. 419.
- (iv.) **C. A.**—*Transfer to County Court—Court in which Action might have been commenced, or in any Court convenient thereto—County Courts Act*, 1888, ss. 65, 74.—Decision of Q. B. D. (*see* Vol. 17, p. 61, i.) affirmed.—*Burkill v. Thomas*, L.R. [1892] 1 Q.B. 312; 66 L.T. 150; 40 W.R. 250.
- (v.) **P. D.**—*Variation of Settlements—Trustee Resident in Australia—Service of Petition*.—The Court refused to allow substituted service of a petition for variation of settlements on a trustee who was resident in Australia, but dispensed with service on him, it appearing that his co-trustee had been duly served, and that neither of the trustees had any beneficial interest in the settled property.—*Taylor v. Taylor*, 66 L.T. 267.

Principal and Surety:—

- (vi.) **Ch. D.**—*Security Given by Debtor to Surety—Right of Creditor to*.—The supposed rule of law that "a bond creditor shall, in the Court of Chancery, have the benefit of all counter-bonds or collateral security given by the principal to the surety" dissented from.—*Sheffield Banking Co. v. Clayton*, 40 W.R. 327.

Railway:—

- (vii.) **Ch. D.**—*Compulsory Powers—Temporary Occupation—Railways Clauses Act*, 1845, s. 32.—A company served notice to take land for the purpose of constructing a temporary railway for carrying materials for their new line. It was possible for the company to carry the materials by the highway. *Held*, that the company had no power under sect. 32

of the Act to construct a railway as opposed to a road, and that the purpose for which land might be temporarily taken was a necessary purpose, and that the mere saving of expense to the railway was not such a necessary purpose.—*Morris v. Tottenham and Forest Gate Railway Co.*, 40 W.R. 310.

- (i.) **Ch. D.—Receiver and Manager—Powers—Rolling Stock—Hire and Purchase Contracts—Sanction of Court—Railway Companies Act, 1867, s. 4.**—When a receiver and manager of a railway company has been appointed, the powers of management remain as before, but are exercisable by the receiver as the officer of the Court, instead of by the officers of the company. *Held*, that a scheme for the consolidation of certain hire-and-purchase agreements relating to rolling stock, which had been entered into by the company, and for the obtaining from the persons taking over the original contracts, of a further advance of money for the purchase of additional rolling stock, the borrowing powers of the company being exhausted, might be carried out by the receiver and manager, the details of the scheme to be settled by the Court.—*In re Eastern and Midlands Railway (No. 2)*, 66 L.T. 153.
- (ii.) **C. A.—Scheme of Arrangement—Confirmation—Jurisdiction—Non-assent of a Class of Shareholders—Railway Companies Act, 1867, ss. 12, 15, 17.**—If any right or interest of a particular class of shareholders in a railway company is prejudicially affected by a proposed scheme of arrangement, the Court has no jurisdiction to sanction the scheme, in the absence of the assent of that class given in the prescribed manner, although the scheme, taken as a whole, benefits rather than prejudices the rights or interests of that class.—*In re Neath & Brecon Railway Co.*, L.R. [1892] 1 Ch. 349; 61 L.J. Ch. 172; 66 L.T. 40; 40 W.R. 289.

Receiver :—

- (iii.) **Ch. D.—Manager of Business of Testator—Soliciting Customers of Business.**—G. was trustee of the business of S. W. and Co. under the will of the testator in the action. He was appointed by the Court receiver and manager of the business, and was subsequently removed. His beneficial interest had passed to his trustee in bankruptcy. He afterwards entered the employment of another firm, and solicited the customers of S. W. and Co. *Held*, that he was acting within his legal rights in doing so.—*Gent-Davis v. Harris*, 40 W.R. 267.

Revenue :—

- (iv.) **Q. B. D.—Duties on Settled Property—Voluntary Settlement—Partnership Articles—Customs and Inland Revenue Acts, 1881, s. 36, and 1889, s. 11.**—By articles of partnership A., one of the partners, was declared to be entitled to certain shares in the business, and power was given him to dispose of his shares by deed or will in favour of a certain class of persons. A., by will disposed of his shares in favour of B., a member of the class, who accepted them and entered into new articles of partnership with the remainder of the partners, in accordance with a provision in the articles. *Held*, that the shares passed to B. under the articles of partnership, which were a voluntary settlement, whereby a life interest was reserved to the settlor, and that duty was payable in respect of the shares.—*Attorney-General v. Gosling*, L.R. [1892] 1 Q.B. 545; 66 L.T. 284; 40 W.R. 366.
- (v.) **C. A.—Land Tax—Railway—Tunnel.**—A railway company was authorised to appropriate and use the subsoil of certain lands without taking the surface of the same. They accordingly used the subsoil of

such lands for the purpose of making a tunnel. *Held*, that they were liable to be assessed to land tax in respect of the tunnel.—*Metropolitan Railway v. Fowler*, L.R. [1892] 1 Q.B. 165; 61 L.J. Q.B. 193; 65 L.T. 772; 40 W.R. 306.

Sale of Food:—

- (i.) **Q. B. D.**—*Abstraction of Element of Value—Guilty Knowledge—Sale of Food and Drugs Act, 1875, s. 9.*—The object of the Act is to protect the buyer, and on proof of the sale of an article of food from which an element has been abstracted whereby the article is injuriously affected in quality, substance, or nature, the intention of the abstractor is immaterial, and his ignorance of the abstraction is no excuse.—*Dyke v. Gower*, L.R. [1892] 1 Q.B. 220; 61 L.J. M.C. 70; 65 L.T. 760.

Sale of Goods.—*See Mortgage*, p. 95, ii.

Settlement:—

- (ii.) **Q. B. D.**—*Joint Power of Appointment—Resettlement—Life Estate—Gift Over on Bankruptcy—Trust to Pay Debts—Revocable Mandate.*—Real estate was settled to the use of X. for life, with remainder to such uses as X. and Y. should jointly appoint, with remainder in default of appointment, to the use of Y. for life. X. and Y., in exercise of their power, appointed the estate to trustees for a term of years, on trust to raise and pay mortgages and scheduled debts of X. and Y., remainder to the use of X. for life; remainder, during the life of Y., to the use of the trustees, on trust to pay the rents and profits to Y. until they should become vested in, or payable to, any other person, and with a discretionary trust for Y., his wife and children on such event happening. The trustees paid certain of Y.'s debts, and then received notice from him to pay no more. Y. became bankrupt, and X. died. *Held*, that the appointment was not a settlement of Y.'s own property on himself, and that the discretionary trust took effect, and the trustee in bankruptcy was not entitled to Y.'s life estate; but that the trust to pay debts was a revocable mandate which had been duly revoked, and that the trustee in bankruptcy was entitled to moneys raised by the trustees of the settlement for the purpose of paying the debts, and remaining in their hands unapplied.—*E. p. Official Receiver; in re Ashby*, 40 W.R. 430.

Settled Estate:—

- (iii.) **Ch. D.**—*Infant—Contingently Entitled—Conveyancing Act, 1881, s. 41—Settled Estates Act, 1877.*—Devise of land to A. on his attaining the age of twenty-four years, or on his death leaving issue. The residuary real estate was devised on trust for sale. There was no power of sale in the will. Petition by trustees of the will, A., who was an infant, the heir-at-law and residuary legatees of the testator, for the sanction of the Court to an agreement for the sale of the lands so devised. *Held*, that the land was "settled estate," and that the sanction should be given.—*In re Sparrow's Settled Estates*, L.R. [1892] 1 Ch. 412; 66 L.T. 276; 40 W.R. 326.

Settled Land:—

- (iv.) **Ch. D.**—*Capital Moneys—Application of—Improvements of Land subsequently Sold—Purchase or Redemption of Rent-Charges—Settled Land Acts, 1882, s. 21, sub.-ss. 2, 3; 1887, ss. 1, 8.*—A tenant for life had, between 1881 and 1885, created rent-charges to secure money borrowed under the Improvement of Land Act, 1864, for improvements within

the Settled Land Act. Some of these charges had, between 1883 and 1885, been bought up by the trustee of the settlement. In 1888, on a sale of the part of the settled estate on which the improvements had been made, the rent-charges were shifted to other parts of the estate. *Held*, that the expenditure of capital money by the trustee prior to the Settled Land Act was by way of investment, and not of redemption of the rent-charges, and that the same remained on foot and were payable by the tenant for life, who was not entitled to have them paid out of capital money, but that the instalments of the rent-charges, which remained due at the passing of the Act of 1887, might be provided for out of capital money, although the portion of the estate on which the improvements had been made had been sold.—*In re Howard's Settled Estates*, 40 W.R. 360.

- (i.) **C. A.**—*Sale by Tenant for Life—Sanction of Court—Duty of Tenant for Life—Settled Land Act, 1882, ss. 3, 15, 50, 53—Settled Land Act, 1890, s. 10, sub-s. (2).*—The discharge by the tenant for life, on a sale under the Settled Land Act, of the duty of considering the interests of all parties entitled under the settlement, is not a condition, and does not affect the title of the purchaser. The Court, in considering whether it should sanction a sale, will have regard to the interests of the estate, and of the tenants and other persons dependent thereon, as well as to the sentimental objections of the remaindermen under the settlement. Decision of the Ch. D. (see Vol. 17, p. 64, iii.) reversed.—*In re Marquis of Ailesbury's Settled Estates*, 61 L.J. Ch. 116; 65 L.T. 830; 40 W.R. 24.

Sheriff:—

- (ii.) **Q. B. D.**—*Execution—Concurrent Writs—Poundage—Extortion—Sheriffs' Act, 1887, s. 29, sub-s. 2 (ii).*—The solicitors for an execution creditor issued two writs of *fi. fa.*, directed to the sheriffs for the city, and for the county of London respectively, and gave each set of sheriff's officers notice of the other writ, and requested them to prevent a double execution. Possession was taken under both writs. The city execution was paid off, and the county sheriffs demanded from the debtor the payment of a sum part of which was payable by the execution creditors, and refused to withdraw till payment of this sum had been made under protest. They also claimed, but did not insist on, the payment of poundage. There was no evidence of malice on the part of the execution creditors or their solicitors, or of want of reasonable cause for the course pursued. *Held*, that the issue of and seizure under the two writs were not illegal; that the county sheriff was not entitled to poundage, and that his officers were liable in nominal damages for not having sooner withdrawn, but that they were not liable to the penalty for extortion.—*Lee v. Dangar, Grant & Co.*, L.R. [1892] 1 Q.B. 231; 66 L.T. 162.
- (iii.) **Q. B. D.**—*Expenses—Right to Sue Execution Creditor—Sheriffs' Act, 1887, s. 20, sub-s. (2)—Order of 31st August, 1888.*—A sheriff's officer is not entitled to sue the execution creditor to recover the amount of expenses incurred by him in the execution of a writ of *fi. fa.*, although such amount is properly payable to him under the statute and order.—*Smith v. Broadbent*, L.R. [1892] 1 Q.B. 551; 66 L.T. 260; 40 W.R. 332.
- (iv.) **Q. B. D.**—*Extortion—Poundage—Unintentional Overcharge—Penalty—29 Eliz., c. 4—3 Geo. I., c. 15—7 Wm. IV. and 1 Vict., c. 55—Sheriffs' Act, 1887, s. 29, sub-s. 2 (b) (d).*—Owing to a clerical error on the part of their clerk, a firm of sheriff's officers claimed and received from an execution debtor a sum for poundage which was £3 in excess of the proper charge. *Held*, that they were not liable to the penalty for extortion.—*Shoppes v. Nathan & Co.*, L.R. [1892] 1 Q.B. 245.

Ship:—

- (i.) **C. A.—Bill of Lading—Voyage—Deviation.**—A ship loaded a cargo at M. for delivery at L. The bill of lading gave the ship liberty to proceed to any ports on (amongst other coasts) the coast of Spain for any purpose. The ship went to B., a port on the coast of Spain, not on the direct route from M. to L., but two days' steam in a contrary direction. The cargo was damaged by the delay. *Held*, that the ship was only entitled to go to ports which were substantially on the course of the voyage named in the bill of lading, and that the shipowner was liable for the damage caused by the delay.—*Margetson v. Glynn*, L.R. [1892] 1 Q.B. 337; 61 L.J. Q.B. 186; 66 L.T. 142; 40 W.R. 264.
- (ii.) **C. A.—Charter-party—Bill of Lading—Incorporation into Charter-party.**—A charter-party provided that the shipowners should provide refrigerating machinery and insulated chambers, and keep the insulated chambers at a certain temperature during the voyage; and provided that the performance by the owners of their part of the agreement should be subject to the exceptions and perils mentioned in the bill of lading according to an attached form; and that all cargo shipped by the charterers should be carried subject to the terms and conditions of the bill of lading, "except as altered by these presents." The bill of lading excepted any loss or damage arising from any defect in (amongst other things) refrigerating engines or chambers, notwithstanding that the same might have existed at, or at any time before, the loading or sailing of the vessel. *Held*, that the exceptions and perils mentioned in the bill of lading were not incorporated into the charter-party so as to lessen or qualify the obligation on the shipowners to provide proper refrigerating machinery and insulated chambers, and to keep the insulated chambers at the specified temperature.—*Sansinena & Co. v. Houston & Co.*, 66 L.T. 246.
- (iii.) **C. A.—Charter-party—Cesser Clause—Demurrage—Delay in Loading.**—By charter-party all liability of the charterer was to cease on completion of loading, provided the value of the cargo was sufficient to satisfy the lien, which was thereby given for (*inter alia*) demurrage. *Held*, that the word "demurrage" did not cover damages for undue detention at the port of loading, and that the cesser clause did not, therefore, exempt the charterer from liability for such delay.—*Dunlop v. Balfour Williamson & Co.*, L.R. [1892] 1 Q.B. 507; 40 W.R. 371.
- (iv.) **C. A.—Charter-party—Loss of Cargo—Liability of Owner—Bill of Lading—Signature by Agent.**—Decision of Q. B. D. (*see* Vol. 17, p. 27, iii.) reversed.—*Baumvöll Manufactur von Schleibler v. Gilchrest & Co.*, L.R. [1892] 1 Q.B. 253; 61 L.J. Q.B. 121; 66 L.T. 66.
- (v.) **Q. B. D.—Charter-party—Signature—Agent—Warranty of Authority—Telegraphic Authority.**—A firm of shipbrokers signed a charter-party in the form "by telegraphic authority" of the charterer "as agent." Owing to a mistake in the transmission of the telegram the freight offered by the charterer had been misrepresented in the telegram which the shipbroker had received from him. The shipowners sued the brokers for breach of warranty of authority. *Held*, that evidence of persons engaged in the business was admissible to explain the effect of the form of signature, and that such evidence shewed that it was commonly adopted in order to negative the implication of any further warranty by the agent than that he had received a telegram, which, if correct, authorized such a charter as that which he was signing, and that the shipbrokers were therefore not liable.—*Lilly Wilson & Co. v. Smales, Eccles & Co.*, L.R. [1892] 1 Q.B. 456.

- (i.) **P. D.—Collision—Fog—Speed—Whistle—Rules, Act 12 (a), 13.**—A steamer was in collision with a sailing ship. Just before the collision the steamer was proceeding at seven or eight knots, and was approaching a bank of fog in which the sailing ship was, but did not sound her whistle, or reduce her speed. The sailing ship was under all plain sail, and was making about four knots. *Held*, that the steamer was to blame for excessive speed, and that she ought to have whistled. *Held*, also, that the sailing ship was not proceeding at a rate of speed beyond what was necessary to keep her under command, considering the locality, and was, therefore, not to blame.—*The N. Strong*, L.R. [1892] P. 105.
- (ii.) **C. A.—Provisional Detention by Board of Trade—Absence of Cause—Compensation—Damage to Reputation of Owner—Merchant Shipping Act, 1876, s. 10.**—When a ship has been provisionally detained by the Board of Trade, and it appears there was not "reasonable and probable cause, by reason of the condition of the ship or the act or default of the owner," for the detention, general damages in respect of injury to the reputation of the owners are not included in the "compensation for loss or damage" caused by the detention, which is recoverable by them in an action against the Secretary to the Board of Trade.—*Dixon v. Sir Henry Calcraft*, L.R. [1892] 1 Q.B. 458.
- (iii.) **P. D.—Seamen's Wages—Disrating—Deductions—Merchant Shipping Act, 1854, s. 171.**—*Semble*, that the master of a ship has the power, and is the proper person, if circumstances require it, to disrate. *Held*, that the reduction in wages consequent on disrating is not a "deduction" required to be entered as such in the Board of Trade form of the account of wages.—*The Highland Chief*, L.R. [1892], P. 76; 40 W.R. 416.
- (iv.) **P. D.—Salvage—Misconduct of Salvors.**—A vessel went ashore in a gale. The crew was saved partly by their own boat, and partly by the lifeboat, the crew of which (the plaintiffs) were remunerated in the usual way. The master went for tugs, leaving the mate and crew to watch the vessel. They went to an inn for refreshment, as nothing could then be done. When the weather moderated the plaintiffs went off to the vessel, forcibly preventing the mate and two of the crew from going with them, and took possession of her as a derelict. On the return of the master with tugs, the plaintiffs prevented him from going on board. The tugs towed the vessel towards a port, but owing to the incapacity of the plaintiffs there was great delay in taking her to a place of safety. *Held*, that the vessel was not a derelict, and that the misconduct of the plaintiffs was such as to work a total forfeiture of salvage reward.—*The Capella*, L.R. [1892], P. 70.
- (v.) **P. D.—Salvage—Negligence of Salvors.**—When salvage services had been rendered, but damage had been done to the salvaged vessel by the bad navigation of the salvaging vessel, the Court deducted the amount of such damage from the sum intended to have been awarded.—*The Durina*, L.R. [1892], P. 58.

Slander:—

- (vi.) **C. A.—County Council—Licensing Meeting—Privileged Occasion—Notice of Action.**—A meeting of a county council for granting music and dancing licences is not a court within the meaning of the rule by which defamatory statements made in the course of proceedings before a Court are absolutely privileged. Therefore, a county councillor making a defamatory statement at such a meeting with regard to a person applying for a licence is not entitled to absolute immunity from an action in respect of such statement, but only to the ordinary

privilege which applies to a communication made without express malice on a privileged occasion. Notice of action is not necessary in the case of an action against a county councillor for a defamatory statement so made. In an action for slander, when the occasion is privileged, the defence of privilege may be rebutted by shewing that, from some indirect motive, such as anger, or gross and unreasoning prejudice, with regard to a particular subject matter, the defendant stated what he did not know to be true, reckless whether it was true or false.—*Royal Aquarium and Summer and Winter Gardens Society v. Parkinson*, L.R. [1892] 1 Q.B. 431.

Solicitor :—

- (i.) **C. A.**—*Charge of Misconduct—Inquiry—No case made—Costs—Solicitors Act, 1888, ss. 12, 13.*—R. made charges of professional misconduct against L., a solicitor, to the Incorporated Law Society. The statutory committee after investigation, reported that the charge had not been made out. The report was filed, and no other step taken. *Held*, that there was jurisdiction to order R. to pay L. the costs of his defence.—*E. p. R.; in re L.*, 66 L.T. 270; 40 W.R. 321.
- (ii.) **Ch. D.**—*Lien—Mortgagor's Title Deeds.*—Where the nature of a mortgage transaction is such, that if the parties were represented by separate solicitors, there would be no handing over of title deeds by mortgagor to mortgagee, a solicitor acting for both parties does not lose his lien on the title deeds of the mortgagor in his possession.—*Brunton v. Electrical Engineering Corporation*, L.R. [1892] 1 Ch. 434; 65 L.T. 745.
- (iii.) **Ch. D.**—*Retainer.*—The fact that a certain solicitor has always acted for trustees in matters connected with the trust, does not of itself authorise him to enter an appearance for the trustees to proceedings commenced against them.—*Gray v. Coles*, 65 L.T. 743.
See Company, p. 79, v.

Specific Performance :—

- (iv.) **Ch. D.**—*Lease—Covenant—Injunction.*—The lease of a residential flat, in a block of buildings let in several flats, contained a covenant by the lessors to employ a resident porter, who was to act as the servant of the several tenants, and to be constantly in attendance, either by himself, or, in his temporary absence, by a trustworthy assistant. The lessors appointed a cook and his wife to reside upon the premises, and permitted the cook to carry on his business as such, and to provide boys and charwomen to do his duties of porter, and was for some months engaged four hours daily, with the assent of the lessors, at a club. *Held*, that the lessors had committed a breach of the covenant, and that the lessees were entitled to a perpetual injunction to prevent the continuance of the breach, on the ground that the lessors had never appointed a porter at all within the meaning of the covenant.—*Ryan v. Mutual Tontine Westminster Chambers Association*, L.R. [1892] 1 Ch. 427; 66 L.T. 277; 40 W.R. 379.

Stage Coach :—

- (v.) **Q. B. D.**—*Driver—Licence—Personal Application.*—The obtaining of a stage coach driver's licence is a personal privilege, and the licensing committee are entitled to require applicants for such licences to make their applications in person.—*Barton v. Davies*, 66 L.T. 192.

Tenant for Life:—

- (i.) **Ch. D.—Mining Leases—Rents and Royalties—Settled Land Acts, 1882-1890.**—Testator agreed to grant mining leases of coal to be worked by instroke from neighbouring mines. At his death one lease had been granted, and two remained to be granted. Work had been commenced, and dead rents paid, but the coal had not been reached. The testator settled the estate by will, making the tenants for life impeachable for waste. *Held*, that the rents and royalties payable under the lease and agreements for leases were receivable by the tenants for life as income. — *Kemeys-Tynte v. Kemeys-Tynte*, 40 W.R. 423.

Trade Mark.—See Costs, p. 83, vi.

Trade Union:—

- (ii.) **C. A. & Q. B. D.—Agreement for Benefit—Direct Enforcement—Trades Union Act, 1871, s. 4, sub-s. 3 (a)—Trades Union Act, 1876, s. 10.**—The nominee of a deceased member of a trade union cannot enforce by action the payment of a sum of money payable by the society as a benefit. — *Crocker v. Knight*, 66 L.T. 186; 40 W.R. 284 and 353.

Trover:—

- (iii.) **Q. B. D.—Conversion of Chattels—Sale by Auction—Liability of Auctioneer.**—A. assigned furniture to the plaintiffs by bill of sale. A. subsequently employed the defendants to sell the furniture by auction at her residence. The defendants sold the furniture by auction without notice of the bill of sale, and in the ordinary course delivered it to the purchasers. *Held*, that they were liable in trover. — *Consolidated Co. v. Curtis & Son*, L.R. [1892] 1 Q.B. 495; 40 W.R. 426.

Trustee.— See Practice, p. 100, viii.

Vaccination:—

- (iv.) **Q. B. D.—Order—Penalty of Disobedience—Previous Conviction—Vaccination Acts, 1867, s. 31; 1871, s. 11.**—A person who has been fined under the section first mentioned by disobedience to a vaccination order cannot be fined again for disobedience to the same order. — *Reg. v. Portsmouth Justices*, L.R. [1892] 1 Q.B. 491; *Reg. v. Pink*, 40 W.R. 413.

Vendor and Purchaser:—

- (v.) **C. A.—Contract—Open Quarry—Rents Received Before Completion.**—On a contract for sale of lands comprising an open stone quarry in lease at the date of the contract, the vendor is entitled, in the absence of any stipulation in the contract, to the rents and royalties received from the lessee in the interval between the date of the contract and the date fixed for completion. *Semble*, that the same rule would apply to profits arising from the working by the vendor if the quarry were in hand. — *Leppington v. Freeman*, 40 W.R. 848.
- (vi.) **Ch. D.—Sale of Equity of Redemption—Indemnity against Mortgage Debt.**—Independently of contract, the purchaser of an equity of redemption is bound to indemnify the vendor against the mortgage debt, and will be compelled to covenant to do so. — *Bridgeman v. Daw*, 40 W.R. 253.

Veterinary Surgeon:—

- (i.) **Q. B. D.—Unqualified Person—Use of Description Stating Qualification—*Veterinary Surgeons Act*, 1881, s. 17, sub-s. 1.**—A shoeing smith not qualified as a veterinary surgeon described his place of business as a "veterinary forge." *Held*, that the words constituted a description stating that he was specially qualified to practice a branch of veterinary surgery, and that he was liable under the Act.—*The Royal College of Veterinary Surgeons v. Robinson*, L.R. [1892] 1 Q.B. 557; 66 L.T. 263; 40 W.R. 412.

Waste:—

- (ii) **Ch. D.—Owner of Rentcharge—Right to Restrain.**—The owner of a rentcharge issuing out of land cannot obtain an injunction to restrain the owner of the land from committing waste.—*Sandeman v. Rushton*, 61 L.J. Ch. 136; 66 L.T. 180.

Will:—

- (iii.) **P. D.—Administration with Will Annexed—Foreign Will—Not Incorporated.**—The testator, a German subject domiciled in England, made an English will duly executed in 1888, in which he referred to "my German will and testament." He had deposited two holograph documents in the Court of Baden. He afterwards, in 1889, executed a third will in the German form, revoking the two former German wills. *Held*, that Lord Kingsdown's Act did not apply, as the German will of 1889 was not made in accordance with the law of the domicile; and that the said will could not be incorporated with the English will, as it was not in existence when the English will was made. Grant of letters of administration with the English will alone annexed.—*In the goods of Keller*, 51 L.J. P. 39; 68 L.T. 763.
- (iv.) **P. D.—Appointment of Executors—Ambiguity—Extrinsic Evidence.**—A testator appointed as an executor "my nephew G. A." There were two persons of that name, one an illegitimate son of the testator's sister, and the other the legitimate son of his brother. It appeared from the will that the testator spoke of an illegitimate grand nephew as his "nephew," and of an illegitimate niece as his "niece." *Held*, that there was an ambiguity, and that extrinsic evidence might be received to show that the illegitimate nephew was meant.—*In the goods of Ashton*, L.R. [1892] P. 83.
- (v.) **C. A.—Construction—Annuity—Cesser on Interfering in Management.**—Devise of real estate to trustees on trust (*inter alia*) to pay an annuity to A. for life, with a proviso that if he should intermeddle with or interfere in, or attempt to intermeddle with or interfere in, the management of the testator's real or personal estate, the annuity to him should immediately cease. A. brought an action against the trustees, alleging that his annuity had not been paid, and making charges of waste and improper conduct in the management of the estate, none of which allegations or charges were established. *Held*, that the action, being frivolous and vexatious, was a breach of the proviso, and that the annuity had ceased.—*Adams v. Adams*, L.P. [1892] 1 Ch. 369; 66 L.T. 98; 40 W.R. 261.
- (vi.) **C. A.—Construction—General Devise and Bequest—"Effects."**—Decision of Ch. D. (see Vol. 17, p. 70, iv.) affirmed.—*Hall v. Hall*, L.R. [1892] 1 Ch. 361; 66 L.T. 206; 40 W.R. 277.

- (i.) **C. A.—Construction—Life Interest—Part of Income payable to another Person on Tenant for Life doing certain Acts—Assignment—Rights of Assignee.**—A testator gave the income of his residuary estate to his children in equal shares for their lives, and provided that M. should maintain a home for the unmarried children, and directed that £50 a year should be paid to M. out of any child's share of the income while he or she should reside with M. A., an unmarried son, ceased to reside with M., and assigned all his interest under the will to B. for valuable consideration. He afterwards returned to reside with M. *Held*, that, notwithstanding the assignment, M. was entitled to be paid £50 a year out of A.'s share of the income while he should reside with her.—*Priestley v. Greenwood*, 66 L.T. 101; 40 W.R. 357.
- (ii.) **Ch. D.—Conversion.**—Devise of land to trustees, on trust for A. and B. successively for life, with remainder on trust for the children of B. There was a power of sale, with a trust for re-investment in freehold, copyhold, or leasehold land, with an interim power of investment in personality. The trustees sold the land and invested the proceeds in consols. The trust for re-investment was never executed. *Held*, that the share of a child of B., who died intestate in the lifetime of a tenant for life, and after the sale, devolved on his heir.—*Pitman v. Pitman*, L.R. [1892] 1 Ch. 279; 66 L.T. 274; 40 W.R. 359.
- (iii.) **Ch. D.—Devise to Joint Tenants Without Words of Limitation.**—Devise of lands to A. for life, remainder to B. for life, remainder to seven persons "as joint tenants and not as tenants in common, and to the survivor or longest liver of them, his or her heirs and assigns." *Held*, that the devise was one of joint life estates, with a contingent remainder over in fee to the survivor.—*Quarm v. Quarm*, L.R. [1892] 1 Q.B. 184; 61 L.J. Q.B. 154; 40 W.R. 302.
- (iv.) **P. D.—Probate—Codicil—Alteration.**—The testator duly executed a will in 1875 leaving all his property to his widow and children. In 1888, he executed a second document in the form of a will, which he enclosed in a sealed envelope with instructions that it should be opened at the same time as his will. He thereby purported to benefit a certain B. No executors were appointed therein, and a printed revocation clause was struck out with a pencil. *Held*, that both documents should be admitted to probate, and that the second should not contain the words of revocation.—*In the goods of Tonge*, 66 L.T. 60.
- (v.) **P. D.—Probate—Executors Resident Abroad—Persons Nominated to act for one of them—20 & 21 Vict., c. 77, s. 73.**—Two executors were appointed, both of whom were resident abroad at the time of the testator's death. The will contained a paragraph requesting R. to act for one of the executors in the event of his absence. There was urgent need of the appointment of an administrator. Grant of administration with the will annexed to R., until one of the executors should come in and prove the will.—*In the goods of Taylor*, L.R. [1892] P. 90; 66 L.T. 266.
- (vi.) **P. D.—Probate—Lunacy of Executor—Revocation of Grant.**—One of two executors of a will, after probate had been granted, became of unsound mind, and no early recovery was anticipated. On motion by his co-executor, *held*, that the grant should be revoked, and a new grant made to the applicant, limited to such time as the other executor should continue of unsound mind.—*In the goods of Sowerby*, 68 L.T. 764.
- (vii.) **P. D.—Probate—Original not Forthcoming—Presumption of Law—Consent of Parties—Draft Will.**—The testator had duly executed a will and codicil. The will was last seen about a year before the testator's

death, when it was handed to him at his request. All parties interested under an intestacy consented to probate of the draft of the missing will. *Held*, that the presumption that the will had been destroyed might be considered as rebutted, and that probate might be granted of the draft of the missing will.—*In re the goods of Berry*, 65 L.T. 763.

- (i.) **P. D.—Probate—Revocation—Absence of Witnesses—Judgment against Will.**—The defendant had obtained probate of an alleged will in common form. The plaintiff sued for revocation of the probate on the ground of incapacity, undue execution, and undue influence. At the hearing the defendant had no witnesses present, and asked for an adjournment, which was refused. The Court, without requiring any evidence to be given in opposition to the will, with some hesitation, pronounced against the will, with costs.—*Martyr v. Perry*, 65 L.T. 794.
- (ii.) **P. D.—Probate—Several Documents—Authenticated Copy.**—Testator left the following testamentary papers: (1) A will relating to property in Argentina, made in the form usual in that country, of which the original was missing, but an authenticated copy was produced; (2) a Scotch settlement or testamentary disposition; (3) an English will and two codicils. The testator's only son, A., was appointed sole executor of the Argentine and Scotch wills, and X. and Y. were appointed executors, together with A., of the English documents. The Court granted probate of all the documents to A., and a grant to X. and Y. limited to the three English documents.—*In the goods of Bridges*, 65 L.T. 764.
- (iii.) **P. D.—Probate—Sole Executrix Lunatic—Grant to Creditor—Personal Service of Citation Dispensed with.**—The sole executrix, and universal legatee of a will, was a lunatic, and a guardian had been appointed by the Lords Justices to receive rents to which she was entitled. A creditor of the testator applied for administration with the will annexed, and served a citation on the guardian, who refused to allow it to be personally served on the lunatic. *Held*, that the grant might be made to the creditor, the personal service being dispensed with.—*In the goods of Atherton*, L.R. [1892] P. 104; 66 L.T. 267.
- (iv.) **P. D.—Probate—Torn Will—Incomplete Restoration—Copy—Grant.**—The will of a testator was, after his death, torn into pieces while a copy was being made by the executor. Most of the pieces were recovered and joined together, but there were some blanks left, though the copy shewed what were the words missing. *Held*, that probate might be granted of the incomplete will and the copy as together constituting the will.—*In the goods of Leigh*, L.R. [1892] P. 82.
- (v.) **P. D.—Probate—Will Proved Abroad—French Law—Copy.**—The will of a British subject domiciled in France at the time of his death had been proved in the French Courts and deposited with a notary, who was forbidden by French law to part with it. *Held*, that probate might be granted of a properly proved copy, limited to such time as might elapse before the original should be brought in.—*In the goods of Lemme*, L.R. [1892] P. 89.

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Quarterly Digest

OF
ALL REPORTED CASES,
IN THE
Law Reports, Law Journal Reports, Law Times
Reports, and Weekly Reporter,
FOR MAY, JUNE, AND JULY, 1892.
By C. H. LOMAX, M.A., of the Inner Temple,
Barrister-at-Law.

Administration:—

- (i.) **P. D.—Bastard—Grant to Crown.**—The Court disapproved of the practice of allowing grants to go to the Crown before an affidavit has been sworn that the deceased died a bastard and intestate.—*In the goods of Frend*, 66 L.T. 380.
- (ii.) **P. D.—Joint Grant to Next-of-Kin and another Person—Consent**—20 and 21 Vict., c. 77, s. 73.—A widow died intestate leaving a brother and nine nephews and nieces, the only persons entitled in distribution. Three of the nephews and nieces were in Australia, but, the other six consenting, the Court made a grant to the brother and one of the nephews.—*In the goods of Walsh*, L.R. [1892] P. 230.
- (iii.) **P. D.—Grant to Receiver in Chancery Division.**—Upon an application for administration, it appeared that the intestate's widow was a lunatic, and that his only other next-of-kin could not find justifying security. A receiver had been appointed in an action in the Chancery Division to administer the estate, but part of the estate could not be realised except by a legal personal representative of the deceased. *Held*, that a grant could not be made to the brother without security, but that it might be made to the receiver, to issue when the registrar was satisfied that the Chancery Division had continued his appointment.—*In the goods of Moore*, L.R. [1892] P. 145.
- (iv.) **P. D.—Will Annexed—Widow Passed Over.**—The Court, being of opinion that the widow of the testator was hostile to the next-of-kin, and that she was going abroad for some time, passed her over, in spite of her opposition, and made a grant to a son of the testator by a former marriage.—*In the goods of Shirley*, 66 L.T. 590.

- (i.) **P. D.**—*Special Circumstances—Married Woman—Husband passed over*—*Probate Act, s. 73.*—Under “special circumstances” the Court granted administration to the father of the intestate, a married woman, passing over her husband, who was out of the country, without requiring him to be cited.—*In the goods of Hill*, 66 L.T. 380.
- (ii.) **Ch. D.**—*Business Carried on by Executor—Account of Profits.*—Where an executor, in carrying on the business of a testator, has supplied such business with goods, the onus lies on him to shew, as to goods not of his own manufacture, what was the cost price, and as to goods of his own manufacture, what would be a fair allowance in respect of their cost, including in such allowance a fair proportion of establishment expenses and of interest on capital, treating the manufactory as part of his capital.—*Morgan v. Williams*, 40 W.R. 636.
- (iii.) **Ch. D.**—*Business—Creditors—Executors—Costs—Priority.*—A testator directed his executors to carry on his business; which they did, and incurred debts. A creditor of the testator obtained judgment for administration. The assets were insufficient to pay the costs and expenses of the executors, and the debts incurred by them in carrying on the business. *Held*, that the executors were entitled to be paid their costs and expenses in priority to the debts incurred by them as aforesaid.—*Frisby, Dyke & Co. v. Owen*, 66 L.T. 718.
- (iv.) **Ch. D.**—*Originating Summons—Debt Statute-Barred—Refusal of Executor to Plead Statute—Right of Residuary Legatee.*—In an originating summons by the executors of a will against a creditor and the residuary legatee, where the creditor's debt is admitted to be statute-barred, but the executors refuse to raise the defence of the statute, the residuary legatee is entitled to do so.—*Hunt v. Wenham*, 40 W.R. 636.

Adulteration:—

- (v.) **Q. B. D.**—*Act of Servant—Knowledge of Master—Sale of Food and Drugs Act, 1875, ss. 6, 25.*—A servant employed to sell milk received milk from his master in an unadulterated state, and before selling it added water. There was no evidence of connivance or knowledge on the part of the master. *Held*, that the master might be convicted of selling adulterated milk.—*Brown v. Foot*, 61 L.J. M.C. 110; 66 L.T. 649.

Arbitration:—

- (vi.) **Q. B. D.**—*Submission to—Step in Proceedings—Stay of Proceedings—Arbitration Act, 1889, s. 4.*—The defendant, who was a party with the plaintiff to a submission to refer the subject matter of the action to arbitration, applied for a statement of claim at the time of entering an appearance, and took out a summons for security for costs, on which an order was made that the plaintiff should give security. *Held*, that the defendant, in applying for security for costs, had taken a “step in the proceedings,” and was, therefore, not entitled to a stay of the proceedings with a view to a reference.—*Adams v. Cattley*, 66 L.T. 687; 40 W.R. 570.

Banker:—

- (vii.) **P. C.**—*Fraudulent Detention of Money by Cashier of Customer—Unauthorised Overdraft—Liability of Bank.*—By arrangement between a bank and the Government the Registrar-General of a colony opened an account which, to the knowledge of the bank, was simply for the purpose of the daily lodgment of the receipts of his department and

the weekly transferring by his cheque of such lodgments to the treasury. The cashier sent to lodge such receipts habitually kept back part, and concealed the fraud by means of forged receipts. The Registrar-General's weekly cheques in favour of the treasury accordingly resulted in a large overdraft, of which he was ignorant, and which the bank did not bring to his notice. *Held*, that the treasury was not liable for the overdraft, as it had only received the amount which had been actually collected, and which the bank by honouring the weekly cheques had represented to have been lodged with it. The overdrafts were without authority, and were outside the scope and object of the lodgments and of the drawings.—*London Chartered Bank of Australia v. McMillan*, L.R. [1892] A.C. 292.

- (i.) **H. L.**—*Loan—Deposit of Securities—Enquiries as to Title.*—Decision of C. A. (see Vol. 16, p. 72, iii.) reversed.—*London Joint-Stock Bank v. Simmons*, L.R. [1892] A.C. 201; 66 L.T. 625.

Bankruptcy:—

- (ii.) **C. A.**—*Bankruptcy Notice—Judgment Debt—Whole of Debt—Satisfaction of Part—Bankruptcy Act, 1883, s. 4.*—An action by P. against the debtor was referred to an official referee, and it was agreed that the debtor should assign to P. certain securities. Judgment was signed in accordance with the order of the referee for £12,000. On appeal the matter was referred back for the securities to be valued, but the judgment was not set aside. P. issued a bankruptcy notice in respect of the whole judgment debt. The securities had not been assigned. *Held*, that the notice was good as no part of the judgment had been paid or satisfied. *Seem*, that if the securities had been assigned the notice would not have been good.—*E. p. Raymond; in re Raymond*, 66 L.T. 400.
- (iii.) **Q. B. D.**—*Costs—Taxation in County Court—Review by High Court Master—Review by Judge—Small Bankruptcy—Bankruptcy Rules, 1886, r. 124—Regulations as to Costs, Appendix, Sched. 2, Nos. 1, 16, 18.*—When a bankruptcy taxing master of the High Court has reviewed a bill of costs taxed in the county court, the judge of the High Court sitting in bankruptcy has power to review the master's decision. In a small bankruptcy, where the assets are certified as not likely to realise £100, the sum of £3, to which the petitioning debtor's solicitor's bill of costs is limited, covers his charges for attending the adjourned public examination, even where such examination has been adjourned to suit the convenience of the official receiver.—*E. p. Board of Trade; in re Allison*, 66 L.T. 688; *e. p. Jaynes; in re Allison*, 40 W.R. 624.
- (iv.) **C. A. & Q. B. D.**—*Discharge—Suspension—Money coming to Bankrupt under Will—Bankruptcy Act, 1883, s. 44.*—An order had been made in 1886 that the discharge of a bankrupt should be suspended till the payment of a certain dividend, and that the order of discharge should take effect on the day of payment to the trustee of a sum sufficient to pay such dividend. Before the payment of such sum the bankrupt became entitled under his father's will to a legacy more than sufficient to provide the dividend. *Held*, that the order was not valid, but must be taken to be valid as it had been acted on for five years. *Held*, also, that the legacy vested in the trustee on the death of the father, and that the bankrupt was entitled to his discharge on the payment thereof to the trustee.—*E. p. Hawkins; in re Hawkins*, L.R. [1892] 1 Q.B. 890; 61 L.J. Q.B. 458; 66 L.T. 466; 40 W.R. 484.

- (i.) **C. A.**—*Goods Taken in Execution—No request to Sheriff to Deliver—Duty of Sheriff—Excessive Fees—Bankruptcy Act, 1883, ss. 9, 45, 46—Sheriffs Act, 1887, 29 (2) (b).*—After goods had been seized by the sheriff under a writ of *fi. fa.*, a receiving order was made against the judgment debtor. The official receiver did not request the sheriff to deliver up the goods, but told him to realise them. The sheriff accordingly sold the goods, and the trustee in bankruptcy subsequently appointed sued him for wrongful sale. *Held*, that the sheriff had acted rightly in selling the goods. The sheriff was requested by the official receiver to send in an account of the sale. He claimed to retain certain amounts in respect of his charges. The official receiver then requested him to bring in his charges for taxation, and he took steps to obtain taxation, which was resisted by the trustee in bankruptcy. The sheriff ultimately obtained an order for taxation, and a large amount was taxed off his account as excessive. In an action against the sheriff by the trustee, *held*, that as the sheriff's claim was made subject to and in contemplation of taxation it did not amount to a taking or demand of money so as to render the sheriff liable to a penalty.—*Trustee of Woolford's Estate v. Levy*, L.R. [1892] 1 Q.B. 772; 40 W.R. 483.
- (ii.) **Q. B. D.**—*Practice—Notice of Motion—Affidavits—Bankruptcy Rules, 1886, rr. 27, 29.*—The affidavits in support of an application in bankruptcy must be served with the notice of motion.—*In re Wells*; *e. p. Collins*, 66 L.T. 688.
- (iii.) **Q. B. D.**—*Proof—Secured Creditor—Omission to Value Security—Inadvertence—Bankruptcy Act, 1883, s. 168; Sched. 1, r. 10.*—In 1885 N. agreed to sell a policy of insurance to the debtor for £3,300. The purchase-money not being paid, a decree for specific performance was made in 1891. A receiving order was made against the debtor, and N. proved for £3,300 without stating that he held security. N. voted in respect of his proof. The trustee applied for a declaration that he was entitled to the proceeds of the policy. *Held*, that N. was a secured creditor, and ought to have valued his security; but the Court, being satisfied on the evidence that the omission to do so was owing to inadvertence, gave him leave to withdraw the proof on terms of paying the costs of the application.—*E. p. Clarke*; *in re Burr*, 40 W.R. 608.
- (iv.) **C. A.**—*Scheme of Arrangement—Approval of Court—Right of Appeal by Board of Trade—Bankruptcy Act, 1883, s. 104, sub-s. 2—Bankruptcy Rules, 1890, r. 202.*—Where the official receiver has reported in favour of a scheme of arrangement, and the Court has approved the scheme in the presence of the official receiver who did not oppose, the Board of Trade may appeal against the order approving the scheme.—*E. p. Board of Trade*; *in re Burr*, 66 L.T. 553.
- (v.) **C. A.**—*Undischarged Bankrupt—After-acquired Property—Right to Convey—Bankruptcy Act, 1873, ss. 44, 54, 168.*—Decision of Ch. D. (see Vol. 17, p. 77, iii.) affirmed.—*In re New Land Development Co. and Gray*, L.R. [1892] 2 Ch. 138. *In re New Land Development Association and Fagence's Contract*, 66 L.T. 694; 40 W.R. 551.
- See Sale of Goods*, p. 144, ii. Solicitor, p. 149, iii.

Bill of Exchange:—

- (vi.) **Ch. D.**—*Renewal—Guarantee—Variation.*—A. sent to X. the following letter of guarantee, dated December 24th, 1866:—"In reply to your letter of the 22nd inst., I hereby guarantee the payment by Mr. Finch of two bills you intend to renew for him, one for £1,048 10s. 5d., and the other for £462 6s. 6d., due respectively the 28th inst. and

the 4th prox." Two bills were drawn by X. on Mr. Finch for three months, both dated December 28th, 1866, one for £1,025 6s 11d., and the other for £485 10s. The bills were not met. *Held*, that a "renewed" bill means a bill between the same parties, for the same amount, for the same period as, and commencing from the date of expiration of, the original bill; and that in this case there was such a variation of the liability guaranteed as released the guarantor.—*Barber v. Mackrell*, 40 W.R. 618.

Bill of Sale:—

- (i.) **C. A.**—*Attornment Clause—Secret Power of Distress—Bills of Sale Acts*, 1878, s. 6; 1882, ss. 3, 8, 9.—W. took a chattel from A. under a hiring agreement, to be paid for by instalments, and removed it to his house. He had mortgaged the house by a deed containing an attornment clause, whereby he agreed to become tenant to the mortgagee at a rent payable quarterly, equal to the amount of the interest. The deed also contained an express power of distress. W. agreed by letter to pay the rent weekly, and to deliver possession on four weeks' notice. Neither deed nor letter were registered as bills of sale. When two instalments of the price of the chattel were overdue, the chattel was seized and sold under a distress put in by the mortgagee. *Held*, that the agreement between W. and the mortgagee was to secure money, and to give a secret power of distress, and was therefore a bill of sale; that it was not within the exception of the proviso to section 6 of the Act of 1878, being a pretended lease made to give further security for the mortgage interest; that W.'s letter was not a new demise, nor a demise by a mortgagee in possession; and that the attornment clause and the letter were bills of sale of chattels, and were void for want of registration.—*Green v. Marsh*, 61 L.J. Q.B. 442; 66 L.T. 480; 40 W.R. 449.
- (ii.) **Ch. D.**—*Lien—Document Authorising Detention of Goods*.—A. and B. agreed in writing that A. should act as agent for the sale of B.'s goods, B. supplying the expenses of the agency; and that if B. should be compelled to make advances, either on account of general expenses or otherwise, he should be secured by the stock of goods in his hands, which B. was not to allow to fall below a specified value. *Held*, that the document was not a bill of sale.—*Morris v. Delobel Flipo*, 66 L.T. 320; 40 W.R. 492.
- (iii.) **H. L.**—*Pledge of Goods with Possession—Licence to take Possession—Authority to Sell—Title*.—The owner of goods which had been seized under a *fi. fa.*, agreed verbally with an auctioneer that in consideration of his paying out the sheriff, he should hold possession of the goods, sell them by auction, and hand over the balance to the owner. The agreement was put into writing, and the sheriff paid out, the man in possession remaining in possession for the auctioneer. *Held*, that the written agreement was not an "assurance" or a "licence to take possession," or in any other respect a bill of sale within the Bills of Sale Acts, 1878 and 1882, as it did not constitute the auctioneer's title, and was not intended to, and did not, come into operation till possession had been actually transferred from the sheriff to the auctioneer. Decision of C. A. (see Vol. 16, p. 4, iii.) reversed.—*Charlesworth v. Mills*, L.R. [1892] A.C. 231; 66 L.T. 690.
- (iv.) **H. L.**—*Validity—Names of Parties*.—*Held*, reversing the decision of C. A. (see Vol. 16, p. 74, iii.) that the grantee was sufficiently described, and the bill of sale valid.—*Simmons v. Woodward*, L.R. [1892] A.C. 100; 61 L.J. Ch. 252; 66 L.T. 534.

- (i.) **C. A. — Validity — Statutory Form — Bills of Sale Act, 1882, s. 7, sub-s. 1, s. 9.**—A bill of sale stipulated that the grantor should keep insured the chattels thereby assigned, and provided that in default the grantee might insure the same, and that the moneys expended for that purpose should be a charge on the chattels. The bill conferred a power of seizure if the grantor "shall make default in payment of the sum or sums of money hereby secured at the time herein provided for payment," and it concluded with a proviso that the chattels should not be liable to seizure for any cause other than those specified in section 7 of the Bills of Sale Act, 1882. *Held*, that the power of seizure was confined to default in payment of the principal and interest, and that the bill complied with the statutory form.—*Briggs v. Pike*, 61 L.J. Q.B. 418; 66 L.T. 637.

See Local Government, p. 133, ii.

Canal:—

- (ii.) **Ch. D. — Mine — Injury to Canal — Injunction.**—An action was brought by the owners of a canal for an injunction to restrain the defendants from working mines so as to injure the canal. *Held*, that the claim of the plaintiffs did not depend on common law right, but was founded on grant, and on the principle which condemns any act in derogation of a grant. *Held*, that the grant of their powers and privileges to the undertakers did not carry with it as a necessary incident the right to such support as was required for the maintenance of the canal to be constructed in the exercise of those powers and privileges. Injunction refused.—*L. & N.W.R. v. Evans*, 66 L.T. 526.

Company:—

- (iii.) **Ch. D. — Director — Qualification — Defect in — Dealing with Company — Allotment — Contract and Registration — Companies Act, 1862, s. 67.**—The directors of a company were not duly qualified. The company contracted to issue to the vendor, who was managing director, fully paid-up shares in satisfaction of his purchase money, and the contract was registered. Thereupon a previous allotment to the vendor was cancelled, and fully paid-up shares were allotted to him. *Held*, in the winding-up, that persons who had notice of a defect in the qualification of directors were not protected in their dealings with the company; that the vendor must be taken to have notice, but that the company could not ratify the allotment to him, and repudiate the contract, so that his shares must be taken as fully paid-up.—*E. p. Nicholson*; *in re Staffordshire Gas and Coke Co.*, 66 L.T. 413.
- (iv.) **C. C. — Director — Qualification Shares — Contract to Take.**—Decision of Ch. D. (*see* Vol. 17, p. 80, iii) affirmed.—*Anglo-Austrian Printing and Publishing Co., &c.*; *e. p. Isaacs*; *e. p. Kegan Paul*, L.R. [1892] 2 Ch. 158; 66 L.T. 593; 40 W.R. 518.
- (v.) **Ch. D. — Incorporated by Act of Parliament — Public Undertaking — Jurisdiction to wind-up — Debenture holder — Rights of — Companies Act, 1862, s. 199.**—A tramway company incorporated by Act of Parliament issued debentures under its statutory powers, which were not repaid at maturity. A debenture holder brought an action against the company, and recovered judgment, and obtained a receiver, but his debt was still unsatisfied. He presented a winding-up petition. *Held*, that there was jurisdiction to wind-up the company, though it was established for the public advantage. *Held*, also, that a debenture holder cannot be put in a worse position than an ordinary creditor, though he may have special remedies under the company's Act.—*In re Borough of Portsmouth Tramways Co.*, 66 L.T. 671; 40 W.R. 553.

- (i.) **Ch. D.—Memorandum of Association—Infant Subscriber—Companies Act, 1862, ss. 6, 18.**—The contracts of an infant being, in general, voidable and not void, an infant who has subscribed the memorandum of association is bound by his signature until the contract thereby created is avoided, and is, therefore, at the time of subscribing his name a "person" within the meaning of section 6 of the Companies Act, 1862, and capable of complying with the requirements of that section. The rights of persons, accrued before such infant's signature is avoided, are not affected by the infant subsequently avoiding it.—*In re Laxon & Co. (No. 2)*, 40 W.R. 621.
- (ii.) **Ch. D.—Profits—Ascertaining of—Sale of Part of Undertaking.**—A banking company with a paid-up capital of £500,000, sold part of its undertaking for £875,000; after deducting the paid-up capital and incidental expenses there remained a net balance of £205,000. *Held*, that this sum was profit, and might be treated as such.—*Lubbock v. British Bank of South America*, L.R. [1892] 2 Ch. 198.
- (iii.) **C. A.—Prospectus—Misrepresentation—Right to Rescind—Contract to take Shares.**—Decision of Ch. D. (*see* Vol. 17, p. 80, v.) reversed.—*In re Metropolitan Coal Consumers' Association; Karberg's Case*, 66 L.T. 700.
- (iv.) **Ch. D.—Purchase of its Shares—Extinguishment.**—A company acting under a power given by a special Act purchased some of its own shares, which were transferred into the name of the company, and no further dividends were paid on them. *Held*, that the shares were extinguished, so that in the winding-up of the company, the liquidator could not make the company a contributory in respect thereof, and make a call on the shareholders for the amount unpaid thereon.—*In re Sovereign Life Assurance Co. (No. 2)*, 61 L.J. Ch. 385.
- (v.) **Ch. D.—Scheme of Arrangement—Approval by Shareholders—Validity of.**—A company formed to acquire and work a Government concession, being unable to raise sufficient capital, made an arrangement with the Government to surrender the undertaking on terms which did not admit of any distribution among the ordinary shareholders, but only among the preference shareholders and debenture holders. A firm holding a large number of preference and other shares offered the ordinary shareholders certain benefits in the event of the arrangement being ratified. The arrangement was ratified by a majority of the shareholders. *Held*, on a petition for the sanction of the Court to a scheme of arrangement that the offer to the shareholders did not invalidate the ratification, and that the scheme should be sanctioned.—*In re Buenos Ayres Water Supply Co.*, 66 L.T. 408.
- (vi.) **H. L.—Shares—Issue at a Discount—Validity—Companies Act, 1862, ss. 7, 8, 12, 25, 38—Companies Act, 1867, s. 25.**—A company limited by shares, formed and registered under the Act of 1862, cannot issue shares as fully paid-up, for a money consideration less than their nominal value. Shares had been so issued in pursuance of a duly registered contract, the transaction being *bona fide* and for the interest of the company. *Quære*, whether the company could call on the holders of such shares for any payment beyond that agreed upon, except in the case of a winding-up. and for the purpose of paying the debts of the company and the expenses of the winding-up.—*Oregum Gold Mining Co. v. Roper*, L.R. [1892] A.C. 125; 61 L.J. Ch. 337; 66 L.T. 427.
- (vii.) **C. A.—Share—Issue of—Liability to Pay in Cash—Subscriber to Memorandum—Companies Act, 1867, s. 25.**—The defendant subscribed the memorandum of association of the plaintiff company for one share. *Held*, that such share was issued to him immediately upon the registration of the company, and that he was liable to pay for it in cash, and

that such liability was not satisfied by the allotment to him of one out of certain shares which were issued as fully paid up to vendors to the company, under an agreement filed upon the registration of the company.—*Dalton Time Lock Co. v. Dalton*, 66 L.T. 704.

- (i.) **Ch. D.—Winding up—Appointment of Liquidator—Determination of Creditors and Contributories—Companies Act, 1890, s. 6, sub-s. 1, 3.**—The right of the majority of the creditors and contributories present at the statutory meetings to have their nominee appointed liquidator, in the place of the official receiver, is subject to the control of the Court, which may, in its discretion, refuse to appoint such nominee or any liquidator, and leave the winding-up in the hands of the official receiver. The “unanimous” determination of the creditors and contributories mentioned in rule 63, sub-r. 2, of the Companies Rules, 1890, refers to the unanimity of all the creditors and contributories at the meetings, and not to unanimity in the result of the two meetings.—*In re Johannesburg Land and Gold Trust Co.*, L.R. [1892] 1 Ch. 583; 61 L.J. Ch. 284; 66 L.T. 605; 40 W.R. 456.
- (ii.) **Ch. D.—Winding up—Creditor’s Right to Compulsory Order—Companies (Winding-up) Act, 1890.**—A creditor who cannot obtain payment of his debt is entitled to a winding-up order, excepting where it is shewn in opposition that he will get no benefit by such order, and where it is opposed by a majority of creditors. But where it is shewn that an investigation into the affairs of a company or the issue of the debentures or shares ought to be made, such investigation being an advantage to the unsecured creditors, a sufficient cause is thereby shewn for making a winding-up order on a creditor’s petition.—*In re Krasnapolsky Restaurant and Winter Garden Co.*, 40 W.R. 639.
- (iii.) **Ch. D.—Winding up—Foreign Company with Branch in England—Provisional Liquidator—Security.**—A company incorporated in Australia, and having a branch office in England, is within the Companies (Winding-up) Act, 1890. The official receiver is the person to be appointed provisional liquidator. Rule 67 of the Companies Winding-up Rules, 1890, providing for the taking of security from a special liquidator or manager, applies to a provisional liquidator, before as well as after a winding-up order has been made.—*In re Mercantile Bank of Australia*, L.R. [1892] 2 Ch. 204; 40 W.R. 440.
- (iv.) **Ch. D.—Winding up—Official Receiver and Liquidator—Appeal—Jurisdiction to Examine Set-off—Companies Winding-up Rules, 1892, r. 3 (1) (b)—1890, rr. 110-112, 178.**—Appeals from the official receiver acting as liquidator should be brought in chambers, and not in Court. The liquidator, in examining a proof, is not limited to deciding on its inherent validity, but may take into consideration matters of set-off. Fraudulent preference is not a matter of set-off.—*E. p. Baines*; in *re National Wholemeal Bread and Biscuit Co.*, 40 W.R. 591.
- (v.) **C. A.—Winding up—Provisional Liquidator—Official Receiver—Companies (Winding-up) Act, 1890, ss. 4, 5, 6.**—After an order has been made for winding up a company there can be no provisional liquidator other than the official receiver.—*E. p. Official Receiver*; in *re North Wales Gunpowder Co.*, 40 W.R. 561.
- (vi.) **C. A.—Winding up—Petition in County Court—Transfer to High Court—Jurisdiction—Companies (Winding-up) Act, 1890, s. 1, sub-s. 3; s. 3, sub-s. 1.**—Companies Winding-up Rules, 1890, r. 8.—The judge who has the exercise of the jurisdiction under the Winding-up Act, has jurisdiction to transfer to the High Court a petition for winding up which has been presented in a county court before any order has been made on the petition.—*In re Laxon & Co.*, 40 W.R. 614.

- (i.) **C. A.**—*Winding up—Persons Publicly Examined—Report by Official Receiver—Companies (Winding-up) Act, 1890, s. 8 (1), (2), (3), (7)—Winding-up Rules, 1890, r. 71.*—There is no jurisdiction to order a person to attend and be publicly examined under section 8 of the Act, unless the court has before it a written report of the official receiver, stating that, in his opinion, a fraud has been committed by such person—*E. p. Barnard; in re Great Kruger Gold Mining Co.*, 40 W.R. 625.
- (ii.) **Ch. D.**—*Winding up—Secured Debt—Omission to Value Security—Inadvertence—Rectification.*—Where a secured creditor has, by inadvertence or mistake, treated his security as collateral, and omitted to value it, and has proved on his whole debt, the Court will allow the proof to be amended by inserting and valuing the security, on being satisfied that such omission and proof was due to inadvertence or mistake. The fact that the creditor has voted makes no difference, provided that his vote did not alter the position of affairs.—*E. p. Huddersfield Banking Co.; in re H. Lister & Co.*, 40 W.R. 589.

See Mortgage, p. 136, ii.

Contempt of Court:—

- (iii.) **Ch. D.**—*Letters to Possible Witnesses.*—Letters written by the plaintiff's solicitor to persons who either had been or probably would be subpoenaed as witnesses in an action, in which charges of dishonesty were made against the defendant, were held to be a contempt of Court.—*Welby v. Still*, 66 L.T. 523.

Contract:—

- (iv.) **C. A.**—*Lunacy—Averment of—Knowledge of other Contracting Party.*—Where the defendant in an action of contract sets up the defence that he was insane when the contract was made, he must, in order to succeed, show that at the time of the contract his insanity was known to the plaintiff.—*Imperial Loan Co. v. Stone*, L.R. [1892] 1 Q.B. 599; 61 L.J. Q.B. 449; 66 L.T. 556.
- (v.) **Q. B. D.**—*Statute of Frauds—Signature of Memorandum.*—A document drawn up by the authorised agent of the defendant, in the form of a letter containing the name of the defendant as the party to whom it is to be addressed, and presented to the plaintiff for his signature, and signed by him as a contract intended to be binding, is a memorandum of contract sufficiently signed by the authorised agent of the defendant to bind him under section 4 of the Statute of Frauds.—*Evans v. Hoare*, L.R. [1892] 1 Q.B. 593; 61 L.J. Q.B. 470; 66 L.T. 345; 40 W.R. 442.

See Vendor and Purchaser, p. 153, ii.

Copyright:—

- (vi.) **Ch. D.**—*Newspaper—Injunction—Costs—Discretion—R.S.C., 1883, O. lxx., r. 1.*—The defendants, the publishers of an evening paper, copied into their paper about two-fifths of a signed article, and also three items of news contained in the plaintiffs' paper, and in which the plaintiffs had copyright. An interim order was made restraining the publication of the article on April 26th. On motion to continue the order and to restrain the publication of the three items of news, the motion being treated as the trial of the action, *held*, that the publication of the article must be restrained by perpetual injunction; that no injunction was necessary as to the items of news, their interest having passed away; that the plaintiffs had suffered no damage; that there was a discretion as to costs, and that the defendants ought to be ordered to pay only the costs of the action up to April 26th, and the further costs of making the interim order perpetual.—*Walter v. Steinkopff*, 40 W.R. 599.

- (i.) **C. A. & Q. B. D.**—*Design—Piracy—Right of Action of Purchaser—Patents, &c., Act, 1883.*—The registered proprietor of a design for lace, agreed with a lace finisher to sell to him exclusively all lace manufactured according to the design. *Held*, that the lace finisher had no cause of action against a person infringing the design.—*Woolley v. Broad*, L.R. [1892] 1 Q.B. 806; 61 L.J. Q.B. 259; 66 L.T. 680; 40 W.R. 511 & 596.
- (ii.) **Q. B. D.**—*Design—Subject of Registration—Patents, &c., Act, 1883, ss. 58, 60, 61.*—A man claimed registration for the "pattern of a basket, consisting in the osiers being worked in singly, and all the butt ends being outside." *Held*, that this did not disclose a proper subject for registration as a design, as it applied to the process of manufacture and to utility, and not to "shape or configuration or ornament."—*Moody v. Tree*, 40 W.R. 558.

See Evidence, p. 126, ii.

Costs :—

- (iii.) **Q. B. D.**—*Damages for Wrongful Detention of Goods—Founded on Tort—County Courts Act, 1888, s. 116.*—The plaintiff bought a chattel from the defendant, an auctioneer, at an auction, but on tendering the purchase money within the time allowed for payment, he found that the defendant had sold the chattel to another person. In an action for wrongful detention of the chattel he recovered £29 and costs. *Held*, that the action was founded on tort, and that as the plaintiff had recovered more than £20, he was entitled to costs on the High Court scale.—*Cohen v. Foster*, 66 L.T. 616.
- (iv.) **C. A.**—*Legitimacy Declaration—Petition for—Opposition of Third Party.*—The Court has jurisdiction to condemn in costs a person cited to see proceedings under the Legitimacy Declaration Act, 1858, when such person opposes the proceedings.—*Bain v. Attorney-General*, L.R. [1892] P.D. 217; 40 W.R. 505.

See Criminal Law, p. 123, i.

County Court :—

- (v.) **Q. B. D.**—*Action Remitted—Costs—Taxation—Jurisdiction—County Courts Act, 1888, ss. 65, 116.*—Where an action has been remitted from the High Court to the county court all original jurisdiction of the High Court over the costs is at an end; a judge of the High Court cannot order the costs to be taxed on the High Court scale.—*Harris v. Judge*, 40 W.R. 461.
- (vi.) **C. A.**—*Admiralty—Jurisdiction—Demurrage—County Courts Admiralty Jurisdiction Acts, 1868, s. 21; 1869, s. 2.*—A shipowner brought an action on the Admiralty side of the county court within the district of which he lived, against the holder of a bill of lading for demurrage. The cargo was at the time of action brought within the district of another county court, and the ship was on the high seas. *Held*, that the action was within Admiralty jurisdiction. *Held*, also, that the action was rightly brought in the court within the district of which the plaintiff lived, for the action related to the ship and not to the cargo.—*Pugsley v. Ropkins*, 40 W.R. 596.

See Ship, p. 148, i.

Criminal Law:—

- (i.) **Q. B. D.**—*Costs—Certiorari—Recognizance—Indictment—Several Counts—Separate Taxation*—16 Vict., c. 30, s. 5—*Crown Office Rules*, 1886, r. 30.—The defendant was charged with several misdemeanours upon an indictment which was removed into the Queen's Bench Division by *certiorari* at the instance of the prosecutors. They entered into a recognizance to pay the defendant's costs if she were "acquitted upon an indictment against her for certain misdemeanours, removed," &c. The indictment contained eight counts, and the defendant was acquitted on six of them. *Held*, that as she had not been acquitted on the whole indictment she was not entitled to have the costs of the six counts paid by the prosecutors.—*Reg. v. Bayard*, 40 W.R. 525.
- (ii.) **C. C. R.**—*Attempt to Commit Criminal Act—Commission of Act Prevented—Intent*—When a person does an act, the natural consequence of which is criminal, but such consequence is prevented by an extraneous cause, he is to be taken to have intended that the natural consequence of his act should result; that is, he is to be considered to have intended to commit the crime which would have resulted had he not been prevented from completing his act. Where, therefore, the prisoner presented a loaded revolver at another person but was prevented from firing by a third person; *held*, that there was evidence to support a conviction of attempting to discharge a loaded firearm with intent to grievous bodily harm.—*Reg. v. Duckworth*, L.R. [1892] 2 Q.B. 83; 66 L.T. 302; 40 W.R. 448.
- (iii.) **C. C. R.**—*Conspiracy to Cheat—Sale of Goods by Servant—Offer of Bribe to Servant—Soliciting to Cheat*.—A person who offers a bribe to a servant intrusted with the sale of goods in order to induce him to sell them below their proper value, may be convicted of soliciting such servant to conspire to cheat and defraud his master.—*Reg. v. De Kromme*, 66 L.T. 301.
- (iv.) **C. C. R.**—*Larceny by Trick—Money Paid as Deposit on Pretended Sale*.—The prisoner met the prosecutor at a fair and agreed to sell him a horse for £23, £8 to be paid at once and the balance on delivery. The prisoner then removed the horse under circumstances which led the jury to infer that he never intended to deliver it. The prisoner was convicted of larceny of the £8. *Held*, that as the prosecutor only parted with the money on condition of the delivery of the horse, and the prisoner never intended to deliver it, the property in the money did not pass to the prisoner, and that the conviction was right.—*Reg. v. Russett*, 40 W.R. 592.
- (v.) **Q. B. D.**—*Obtaining Money under False Pretences—Evidence of Guilty Knowledge*.—Bonds which had been stolen in 1883 were found in the prisoner's possession in 1890. He was dealing with them under an assumed name. *Held*, that there was evidence of guilty knowledge on which he could be committed for trial; and that his conduct amounted to a false representation of the genuineness of the bonds, which was not affected by the fact that innocent purchasers would be able to get the bonds cashed.—*In re Pinter*, 66 L.T. 324.

Damages:—

- (vi.) **C. A.**—*Compensation for Minerals—Interest on*—3 & 4 Will. IV., c. 42, s. 29.—Decision of Ch. D. (see Vol. 16, p. 10, i.) affirmed.—*Phillips v. Homfray*, L.R. [1892] 1 Ch. 465; 61 L.J. Ch. 210; 66 L.T. 657.

- (i.) **H. L.**—*Wrongful Detention of Goods—Effect of Consent Order—Receiver.*—D. commenced an action against the P. company, claiming eleven cargoes of guano then on their way to Europe, and an injunction to restrain the company from dealing with the cargoes. The company denied D.'s title. A consent order was made when only two cargoes had been actually received by the company, under which the company was to retain possession of the cargoes without prejudice to any question between the parties, undertaking to keep proper accounts, and to abide by any order of the Court. A receiver was afterwards appointed. Ultimately the Court held that the cargoes were the property of D., and an inquiry as to damages was ordered. *Held*, that the effect of the consent order was not to make the detention after the date of the order lawful, and that the period of illegal detention, in respect to which the company was liable in damages, was to be computed from the arrival of each cargo to the date of the appointment of the receiver, after which the goods were in the hands of the Court. —*Peruvian Guano Co. v. Dreyfus*, L.R. [1892] A.C. 166; 66 L.T. 536.

Debtor and Creditor:—

- (ii.) **Q. B. D.**—*Agreement by Creditor to Postpone Debt—Deed of Assignment by Debtor—Postponed Creditor a Trustee of his Dividend.*—In order to induce the plaintiff, a banker, to allow W. an overdraft not exceeding £800, the defendant, who was a creditor of W., agreed in writing that "the amount due to me shall not be recoverable until the amount due to you on the overdraft shall have been paid." The plaintiff thereupon allowed W. the overdraft. W. executed a deed of assignment for the benefit of his creditors, and the plaintiff and defendant both sent in claims. *Held*, that the agreement made the defendant a trustee for the plaintiff of any dividend received by him out of W.'s estate, and that the plaintiff had not lost his rights under the agreement by claiming under the deed of assignment. —*Berwick v. Mathew*, 66 L.T. 564; 40 W.R. 527.

Deed:—

- (iii.) **C. A.**—*Construction—Rule in Shelley's Case.*—By deed, dated in 1854, land was conveyed to such uses as A., B., and C. should jointly appoint, and subject thereto in thirds; the limitations of one-third being to such uses in favour of A. and B., or either of them, as C. should by deed appoint, and subject thereto to the use of C. for life without impeachment of waste, with remainder to the use of A. and B. as tenants in common for their joint lives without impeachment of waste, with remainder to the use of the survivor of A. and B. for life without impeachment of waste, with remainder to such uses as C. should by will appoint, with an ultimate limitation "to the use of such person or persons as, at the decease of C., shall be his heir or heirs-at-law, and of the heirs and assigns of such person or persons." *Held*, that the rule in Shelley's case did not apply, and that C. took an estate for life, with remainder in fee to his heir as *persona designata*. —*Evans v. Evans*, L.R. [1892] 2 Ch. 173; 40 W.R. 465.

Detinue:—

- (iv.) **C. A.**—*Owners in Common—Special Property—Agreement as to Possession—Pledge—Action against Third Party.*—The plaintiff and F. were owners in common of a gold box under an agreement, by which the plaintiff was to have possession of it until it was sold. The plaintiff entrusted the box to F. to take to C. for the purpose of being sold by

him. F., being indebted to the defendant, deposited it with him as security. *Held*, that the plaintiff had a special property in F.'s moiety, which gave him the right to immediate possession; and that he was entitled to maintain an action of detinue against the defendant.—*Nyburg v. Handelaar*, 40 W.R. 545.

Easement:—

- (i.) **Ch. D.—Light—New Building—Claim to Ancient Lights.**—In order to entitle the owner of a new building, erected on the site of an old one, to claim access of light to his windows, it must be shown that some defined part of an ancient window admitted access of light through the space occupied by some defined part of a new window.—*Pendarves v. Monro*, L.R. [1892] 1 Ch. 611.

Ecclesiastical Law:—

- (ii.) **Arches Court of Canterbury.**—*Church Discipline Act, s. 15—Appeal in Criminal Suit—Security for Costs.*—A criminal suit having been promoted against the incumbent of a parish, the bishop suspended him for two years, and condemned him in costs. He appealed to the Court of Arches. On motion on behalf of the bishop, and on proof that the appellant was in a state of poverty, and had not paid any of the costs in which he had been condemned, the Dean of Arches ordered him to give security for the costs of the appeal.—*O'Malley v. Bishop of Norwich*, L.R. [1892] P. 175.
- (iii.) **Chancery Court of York.**—*Monition—Disobedience to—Enforcing.*—Monitions enjoining a clerk to abstain from certain offences are not to be considered as forbidding him under pain of being pronounced in contempt to resort at any time during his life to the practices from which he has been enjoined to abstain. Monitions were served on C., a clerk, in 1886, enjoining him to abstain from certain practices. He was suspended for six months for disobedience, and, the suspension being disregarded, was imprisoned from May 4th to May 20th, 1887. From 1886 to 1890 proceedings were pending in the Temporal Courts relative to and in connection with the ecclesiastical suit. In October, 1890, C. repeated some of the practices against which he was enjoined. There was no evidence as to his conduct between May 20th, 1887, and October, 1890. *Held*, that having regard to the lapse of time since the expiration of the sentence of suspension, the monitions ought not to be enforced.—*Hakes v. Coz*, L.R. [1892] P. 110.
- (iv.) **Consistory Court of London.**—*Jurisdiction—Faculty—Churchyard Closed for Burials—Widening Road—Removal of Remains.*—*Held*, that there was jurisdiction to authorise by faculty the appropriation of part of a churchyard closed for burials for the widening of a public street, it being proved that such widening would be of great convenience to the public and the congregation of the church. It was ordered that all human remains disturbed in carrying out the works should be removed to a vault to be constructed in the churchyard; and on its appearing that there was no room in the churchyard for such a vault, the said remains were ordered to be placed in the crypt of the church. On a subsequent petition to authorise the removal to a cemetery of such remains, and of other remains found in the crypt, such removal being expedient for sanitary reasons, *held*, that there was jurisdiction to authorise the removal.—*Vicar and one of the Churchwardens of St. Botolph Without, Aldgate v. The Parishioners of the same*, L.R. [1892] P. 161.

- (i.) **Consistory Court of London.**—*Churchyards Closed for Burials—Faculty for Laying out as Public Garden—Metropolitan Open Spaces Act, 1881, s. 5—Private Vaults.*—A faculty had been decreed to issue allowing a churchyard, closed for burials and containing two private vaults, one in repair and one out of repair, to be laid out as a public garden, subject to future order as to how such vaults were to be dealt with. *Held*, that the vault in repair should not be interfered with, but that the vault out of repair should be levelled with the ground and filled up.—*Vicar and Churchwardens of St. Botolph Without, Aldgate v. Parishioners of the same*, L.R. [1892] P. 173.

Evidence:—

- (ii.) **C. A.**—*Infringement of Copyright in Picture—Production of Original—Whether Necessary.*—In an action for damages for infringement of copyright in a picture, the plaintiff did not produce the original, but gave evidence that he had seen it, and that a photograph sold by the defendants, which he produced, was directly taken from an engraving, which also he produced, which was an exact copy of the original picture. *Held*, that this evidence was admissible to prove the infringement, and was evidence for the jury that the photograph sold by the defendants was a copy of the original picture.—*Lucas v. Williams & Son*, L.R. [1892] 2 Q.B. 113; 66 L.T. 706.

Executor:—

- (iii.) **H. L.**—*Right of Action against—Tort—Quasi-Contract.*—Decision of C. A. (*see* Vol. 14, p. 108, v.) reversed on the facts, without deciding any question of law.—*Concha v. Concha* (No. 2), 66 L.T. 303.

Gaming:—

- (iv.) **Ch. D.**—*Stock Exchange Transactions.*—The plaintiffs were a company formed for the purpose of carrying on stock-jobbing operations, and bought and sold for the defendant large quantities of stock. Each transaction was commenced by an order in writing from him, and the company sent in return a "bought" or "sold" note, which referred to certain conditions indorsed on it, a copy of which the defendant had signed before beginning dealings. The conditions stated that the parties could demand delivery of the stock purchased, and that the contracts were not contracts of gaming or wagering. The plaintiffs sued for balances due on closing accounts. The defendant pleaded that the transactions were gaming or wagering transactions. *Held*, that there was no evidence that delivery of the stock could not be enforced, and that the contracts were not contracts of gaming or wagering.—*Universal Stock Exchange v. Stevens*, 66 L.T. 612; 40 W.R. 494.

Gift:—

- (v.) **Q. B. D.**—*Verbal Gift of Chattels—Delivery.*—Furniture belonging to A.'s father was in the possession of A.'s husband in a house where A. and her husband resided. The father, being with A. in a room where some of the furniture was, verbally gave her the furniture by words of present gift. He then left the house, leaving the claimant in the room. The furniture still remained in the house. *Held*, that manual delivery was not necessary to complete the verbal gift, and that there had been such a change of possession from A.'s husband to A., consequent upon the gift, as was sufficient to effectuate it.—*Kilpin v. Rutley*, L.R. [1892] 1 Q.B. 582; 40 W.R. 479.

Highway :—

(i.) **C. A. & Q. B. D.**—*Diversion—Notices—End of Highway—Description—Ambiguity—Highways Act, 1835, s. 85.*—In proceedings for diverting part of a highway, the notices of the proposed diversion must be affixed at each end of the part which it is proposed to stop up. Where a highway proposed to be diverted was described in the notices and the justices' certificate as a "highway or bridlepath and footpath," but there had been a dispute as to whether it was not also a cartway; *held*, that this did not constitute an ambiguity, for an order under the statute to stop up a highway has the effect of stopping it up for all purposes.—*Reg. v. Justices of Surrey*, L.R. [1892] 1 Q.B. 633; 66 L.T. 578; 40 W.R. 500.

(ii.) **Q. B. D.**—*Obstruction by Stones—Highway Act, 1835, s. 56—Knowledge of Surveyor—Liability.*—The appellant was surveyor of highways, and a foreman was, under his general directions, in charge of the repair of a road. By the order of the foreman, stones were placed on the road about noon and allowed to remain in heaps, whereby an accident was caused to the respondent at night. The appellant had no personal knowledge of the stones having been put there, but he was convicted of an offence against the section above-mentioned. *Held*, that the conviction must be quashed, as there was nothing to throw any criminal responsibility on the surveyor.—*Hardcastle v. Beilby*, L.R. [1892] 1 Q.B. 709; 61 L.J. M.C. 101; 66 L.T. 343.

Husband and Wife :—

(iii.) **P. D.**—*Divorce—Costs—Variation of Settlement.*—On a petition by the wife, a decree of dissolution of marriage was pronounced, and the respondent was condemned in costs. He could not be found, and there was no prospect of recovering the costs from him. Upon an application for variation of the settlement, it appeared that the husband had brought nothing into settlement. *Held*, that part of the settled funds might be applied in paying the balance still unpaid of the costs of the suit and of the petition for variation of the settlement.—*Hipwell v. Hipwell*, L.R. [1892] P. 147.

(iv.) **P. D.**—*Divorce—Decree Nisi—Delay in Moving for Decree Absolute—Power to Dismiss Petition.*—The wife, in a suit for divorce obtained a decree nisi, but allowed more than a year to elapse without moving for a decree absolute. *Held*, on the respondent's application to make the decree absolute or dismiss the petition, that in default of the petitioner moving for the decree absolute within a week, the petition must be dismissed.—*Lewis v. Lewis*, L.R. [1892] P. 212.

(v.) **P. D.**—*Divorce—Insanity whether a Defence—Protection of Wife.—Quære*, whether insanity can, under any circumstances, afford a defence to a petition for divorce. *Held*, that if it can do so, the plea must state that the insanity is lasting, and that there is no hope of recovery or amelioration, and that it is not a mere recurrent or intermittent insanity. Where a husband is subject to recurring fits of mania, which, though they may assume the form of disease, endanger the safety of the wife, she is entitled to be protected by a judicial separation.—*Hanbury v. Hanbury*, L.R. [1892] P. 222.

(vi.) **P. D.**—*Divorce—Variation of Settlements—Maintenance of Children—20 & 21 Vict., c. 85, s. 35—22 & 23 Vict., c. 61, s. 4.*—The Court has no power to make provision for the maintenance of children above the age of sixteen years.—*Blandford v. Blandford*, L.R. [1892] P. 148.

- (i.) **Ch. D.**—*Real Property of Wife — Succession to—Curtesy — Married Women's Property Act, 1882, s. 1, sub.s. (1), s. 5.*—A husband is still entitled as against the heir-at-law of his wife to an estate by the curtesy in her undisposed of real property.—*Hope v. Hope*, 66 L.T. 522; 40 W.R. 522.

See Will, p. 154, iv.

Infant:—

- (ii.) **Q. B. D.**—*Debt of—Compromise after coming of Age—New Consideration—Infants' Relief Act, 1874, s. 2.*—A. contracted a debt during infancy. He was sued after coming of age, and pleaded infancy. The action was compromised on terms of A.'s giving the creditor a bill for less than the amount claimed. The bill was transferred for value to X., the creditor's solicitor, who took it with knowledge of the circumstances. Held, that he could not recover the amount from A.—*Smith v. King*, 40 W.R. 542.
- (iii.) **Ch. D.**—*Maintenance — Contingent Interest — Intermediate Income — Conveyancing Act, 1881, s. 43.*—Specific devise and bequest of scheduled property "whether real or personal" to trustees, upon trust for testator's daughter for life, and after her decease for her children, sons at twenty-one, daughters at that age or marriage; devise and bequest of residue to the trustees to be held, as to a moiety, upon the trusts declared of and concerning the said scheduled property. The scheduled property only comprised freeholds. The daughter died, leaving two infant children. Held, that the infants were contingently entitled to the income, accruing after their mother's death, of the specifically devised freeholds, and of one moiety of the residue, and that the trustees had therefore power to apply such income for their maintenance.—*Banks v. Heaven*, L.R. [1892] 2 Ch. 38.

Insurance:—

- (iv.) **Q. B. D.**—*Life—Insurable Interest.*—In an action on a policy of insurance effected on the life of a child, the step-sister of the plaintiff, evidence was given of a promise made by the plaintiff to the child's mother to take care of the child and help to maintain her. No objection was taken by the defendants that the plaintiff had not in fact incurred any expenditure in respect of the child. Held, that the plaintiff had an insurable interest in the child's life.—*Barnes v. London, Edinburgh & Glasgow Life Insurance Co.*, L.R. [1892] 1 Q.B. 864.
- (v.) **Ch. D.**—*Re-Insurance—Construction of Policy—Payment by Re-Insured not Condition Precedent.*—A ship was insured in the W. company. That company re-insured with the E. company, and paid the premiums. The policy of re-insurance contained the clause: "Being a policy of re-insurance applying to the lines of the W. company, policy No. , subject to the same terms and conditions as the original policy or policies, and to pay as may be paid thereon." The ship was damaged and the W. company became liable to pay on their policy. Held, that actual payment thereon was not a condition precedent to the payment by the E. company on the policy of re-insurance.—*E. p. Western Marine Insurance Co.; in re Eddystone Marine Insurance Co.*, 61 L.J. Ch. 362; 66 L.T. 370; 40 W.R. 441.

Interest:—

- (vi.) **Q. B. D.**—*Judgment Debt—Sum to be Paid by Instalments—1 & 2 Vict., c. 110, s. 17.*—In an action against the defendant, judgment was entered by consent for £1,250 and costs, to be paid by eight equal half-yearly

instalments; and it was provided that execution should not issue if the payments were regularly made. The costs were paid, and the instalments were regularly paid by the defendant. *Held*, that the plaintiff could not claim interest on the instalments.—*Caudery v. Finnerty*, 66 L.T. 684.

See Damages, p. 123, vi.

International Law :—

- (i) **Ch. D.—Charge on Foreign Land—Jurisdiction—Receiver.**—The I. company, incorporated according to the laws of the United States, issued debentures charged on property in Mexico. They were secured by a covering deed which charged the property, gave powers of sale, and provided that certain persons, appointed to represent the debenture holders, might call for the registration in Mexico of the charge. The registration had never been made or demanded, and by Mexican law the charge was of no effect without registration. The M.L.C. company was formed in England to take over the assets and liabilities of the I. company, and the property of the I. company was transferred to the M.L.C. company subject to the rights of the debenture holders. The transfer was registered in Mexico. Action commenced by debenture holders to enforce their security, and motion for a receiver of the Mexican land. *Held*, that the M.L.C. company had taken a conveyance of the land subject to the rights of the debenture holders, and that as the company was subject to the jurisdiction of the court, the court could prevent it from gaining an inequitable advantage by having registered its conveyance before the registration of the charge, and, *semble*, had jurisdiction to appoint a receiver. But the court refused to make the appointment on an interlocutory motion, being satisfied that the debenture holders would gain no benefit.—*Mercantile Investment, &c., Co. v. River Plate Trust, Loan and Agency Co.*, 66 L.T. 711.

Justices :—

- (ii) **Q. B. D.—Appeal—Notice—Admissions—Summary Jurisdiction Act, 1879, s. 31, sub-s. 2, and s. 19.**—A notice of appeal from justices may be properly addressed to the clerk, instead of to the justices personally. The fact that the appellant, when charged, admitted an assault, but asked for the charge to be heard on the ground of mitigating circumstances, is not a simple plea of guilty debaring him from appeal.—*Reg. v. Essex Justices*, 61 L.J. M.C. 120; 66 L.T. 676; 40 W.R. 446.
- (iii) **Q. B. D.—Practice—Appeal to Quarter Sessions—Deposit instead of Recognisance—Notice of Appeal—Summary Jurisdiction Act, 1879, s. 31, sub-ss. 2, 3.**—A court of summary jurisdiction when allowing an appellant to make a deposit instead of entering into a recognisance, ought to have the notice of appeal before it; and where such a court gave leave to an intending appellant to make a deposit, and fixed the amount, before the notice of appeal was given; *held*, that the court of Quarter Sessions were right in refusing to hear the appeal.—*Reg. v. Justices of Angelsey*, L.R. [1892] 2 Q.B. 29.
- (iv) **Q. B. D.—Practice—Prosecution for Keeping Brothel—Warrant for Arrest—25 Geo. II., c. 36, ss. 5, 6, 7—58 Geo. III., c. 70, s. 7—Criminal Law Amendment Act, 1885, s. 13.**—If, on a prosecution under the Act of 1885 of a person accused of keeping a brothel, an application for a warrant for his arrest is made on notice given by two inhabitants in accordance with 25 Geo. II., c. 36, a magistrate is bound to grant such warrant.—*Reg. v. Newton*, L.R. [1892] 1 Q.B. 648; 61 L.J. M.O. 121.

- (i.) **Q. B. D.**—*Practice—Two Informations—Hearing of Second before Deciding First.*—H. was charged at petty sessions upon two informations, the first charging him with an offence against sect. 4, and the second with an offence under sect. 3, of the Indecent Advertisements Act. After hearing the case on the first information, and after being applied to by H.'s counsel to dismiss it, the justices stated that they "reserved judgment" until after they had heard the second case. The case on the second information having been heard, H. was convicted on both informations. *Held*, that both convictions were bad.—*Hamilton v. Walker*, L.R. [1892] 2 Q.B. 25; 61 L.J. M.C. 134; 40 W.R. 476.
- (ii.) **Q. B. D.**—*Recovery of Poor-rates—Power to State Case—Summary Jurisdiction Act, 1884, ss. 7, 10—Interpretation Act, 1889, s. 13, sub-s. 11.*—Justices sitting to hear an application for the issue of a distress warrant for the non-payment of poor rates are not necessarily exercising a ministerial duty, but are authorised to inquire into the validity of the objections taken by the party summoned, and to state a case for the opinion of the High Court.—*Fourth City Mutual Building Society v. Churchwardens of East Ham*, L.R. [1892] 1 Q.B. 661.
- (iii.) **Q. B. D.**—*Right to Trial by Jury—Fine—Imprisonment in Default—Summary Jurisdiction Act, 1879, s. 17.*—Where an offence is punishable in the first instance by a fine, but the person convicted is liable to six months' imprisonment, in case of non-payment and in default of sufficient distress to satisfy the fine, the offence is not one "in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months," so as to entitle the person charged to claim a trial by jury. So *held*, in the case of an information against a brewer for having made an untrue entry in his brewing book, contrary to the provisions of the Inland Revenue Act, 1890, s. 20.—*Carle v. Elkington*, 40 W.R. 510.
- (iv.) **Q. B. D.**—*Summary Trial with Consent—Right of Appeal—Summary Jurisdiction Act, 1879, ss. 12, 19.*—Where a person charged before a court of summary jurisdiction with an indictable offence, consents to be dealt with summarily and is convicted, he has no right of appeal to Quarter Sessions.—*Reg. v. Justices of London*, L.R. [1892] 1 Q.B. 664; 61 L.J. M.C. 104; 66 L.T. 678; 40 W.R. 575.
- See Licensing, p. 132, ii.*

Landlord and Tenant:—

- (v.) **Q. B. D.**—*Breach of Covenant to Repair—Action for Re-entry—Relief against Forfeiture—Conveyancing Act, 1881, s. 14, sub-s. 2.*—Where in an action for re-entry for breach of covenant to repair, the defendant applies to the Court for relief, the Court may, in its discretion, stay the action upon payment by the defendant of the plaintiff's costs as between solicitor and client, as well as of the costs of surveys and schedules of dilapidations.—*Bridge v. Quick*, 61 L.J. Q.B. 375.
- (vi.) **C. A.**—*Covenant for Quiet Enjoyment—Underlease—Re-entry by Original Lessor.*—An underlease contained a covenant for quiet enjoyment of the demised premises by the lessee "without any interruption from or by him, the said lessor, his executors, administrators, or assigns, or any person or persons whomsoever lawfully claiming by, through, or under him." The original lessor re-entered for non-payment of rent and breach of covenant. *Held*, that there was no breach of the covenant for quiet enjoyment.—*Kelly v. Rogers*, L.R. [1892] 1 Q.B. 910; 66 L.T. 582; 40 W.R. 516.

- (i.) **C. A.**—*Distress—Bailiff—Law of Distress Amendment Act, 1888, s. 7.*—*Held*, that the managing director of an incorporated company who distrained in person for rent due to the company, acted as a bailiff, and, in the absence of the certificate of a county court judge authorising him so to act, committed a trespass.—*Hogarth v. Jennings*, L.R. [1892] 1 Q.B. 907; 40 W.R. 517.
- (ii.) **C. A.**—*Lease—Forfeiture—Relief—Conveyancing Act, 1881, s. 14, sub-ss. 1, 2.*—Relief against re-entry or forfeiture for breach of a covenant to repair cannot be granted after the lessor has obtained judgment for redelivery of possession, and has obtained possession under it.—*Rogers v. Rice*, L.R. [1892] 2 Ch. 170; 66 L.T. 640; 40 W.R. 489.
- (iii.) **Ch. D.**—*Relief against Forfeiture—Repairs—Claim for Compensation in Money—Procedure—Conveyancing Act, 1881, s. 14.*—The lessor served notices on the lessee and his mortgagees, the plaintiffs, requiring them to do certain repairs to the demised property, and to pay a named sum for surveyor's and solicitor's fees. He brought county court actions against weekly tenants of the property, and recovered judgment for possession. The plaintiffs took out a summons for relief, and served notice of motion for an injunction on the lessor, but he obtained possession before the summons or the motion could be heard. *Held*, that the county court actions were conclusive as against the weekly tenants; that the summons was in time under the circumstances; that the lessor's notices were valid, it not being necessary to claim compensation where none is required; and, on the merits, that the plaintiffs were not entitled to relief.—*Lock v. Pearce*, 40 W.R. 508.
- (iv.) **Q. B. D.**—*Public Health (London) Act, 1891, ss. 3, 4, 11, 120, 128—Nuisance from Structural Defect—Recovery of Expenses.*—A nuisance arising in a house in London, of which the plaintiff was tenant to the defendant, the sanitary authority served a notice on the premises addressed to the owner or occupier, and requiring the nuisance to be abated. The plaintiff did the necessary work, and it appeared that the nuisance arose from a structural defect in the drains. *Held*, that the plaintiff was legally compellable to do the work, and that the notice being in effect an order, and the defect being one of a structural character, he was entitled to recover the cost of the work from the owner.—*Gebhardt v. Saunders*, 40 W.R. 571.

Lands Clauses Act :—

- (v.) **Q. B. D.**—*Railway—Sale of Surplus Land—Covenant to Re-sell Part—Lands Clauses Act, 1845, s. 127.*—A railway company sold to a purchaser a plot of land which was not required by them for the purposes of their undertaking. The conveyance contained a covenant by the purchaser to re-sell a certain defined part of the land on being required to do so. *Held*, that though the covenant vitiated the sale of the part of the land to which it related, it did not affect the validity of the sale of the remainder of the land.—*Ray v. Walker*, L.R. [1892] 2 Q.B. 88.

Libel :—

- (vi.) **C. A.**—*Privilege—Extract from Register of Judgments.*—The publication of a mere copy of what is contained in a register of judgments, kept in pursuance of an Act of Parliament, and which the public are by law entitled to inspect, is privileged. A trade protection society's journal published an extract from the register of county court judgments, stating that judgments had been recovered against persons named, including the plaintiff. A note was added to the effect that the statement was taken from the register, but

that no distinction was made in the register between actions for debt or damages or properly disputed cases, neither was it known which of the judgments remained unpaid, but it was probable that a large proportion of them had been settled or paid. The plaintiff brought an action for libel, alleging by way of innuendo that the statement meant that a judgment had been recovered against him, which remained unsatisfied, and that he was insolvent and a person to whom credit ought not to be given. *Held*, that the statement was incapable of the meaning imputed by the innuendo, that the publication was privileged, and that in the absence of evidence of express malice the action could not be maintained.—*Searles v. Scarlett*, L.R. [1892] 2 Q.B. 56.

Licensing :—

- (i.) **Q. B. D.**—*Application for Licence—Notice of—Description of Premises.*—An applicant for an off-licence, in the notice of his application, described his premises as “situated in the market place” and “of which P. is the owner.” P. owned other houses in the market place, which, however, contained only seventeen houses, none of which were numbered. *Held*, that the description was sufficient.—*Reg. v. Licensing Justices for Penkridge*, 61 L.J. M.C. 132; 66 L.T. 371.
- (ii.) **C. A.**—*Licensing Justices—Appeal—Notice of—Statement of Case—Summary Jurisdiction Act, 1879, ss. 31, 33—Summary Jurisdiction Act, 1884, s. 7—Interpretation Act, 1889, s. 13, sub-s. 11.*—Justices acting as licensing justices under the Licensing Act, 1828, are a “court of summary jurisdiction,” within the sections which provide for service of notice of appeal from the decision of such a court upon their clerk, and for the statement by them of a case on a question of law.—*Reg. v. Glamorganshire Justices; Reg. v. Pontypool Justices*, L.R. [1892] 1 Q.B. 621; 66 L.T. 444; 40 W.R. 436.
- (iii.) **Q. B. D.**—*Permitting Drunkenness on Licensed Premises.*—On an information against an innkeeper under section 13 of 35 & 36 Vict., c. 94, for permitting drunkenness on licensed premises, it is not necessary to prove actual service of liquor to the drunken person.—*Hope v. Warburton*, L.R. [1892] 2 Q.B. 134; 66 L.T. 589; 40 W.R. 510.
- (iv.) **Q. B. D.**—*Renewal of Licence—Notice of Opposition—Licensing Meeting—Adjourned Meeting—Licensing Act, 1872, s. 92, sub-s. 2.*—A. was on the 17th August served with notice of opposition to the renewal of his licence. The general annual licensing meeting for the petty sessional division was on the 24th August, but the adjourned licensing meeting for that part of the division in which A.'s house was situate, and at which he would in the ordinary course apply for the renewal of his licence, was fixed for the 18th September. *Held*, that the adjourned meeting was “the general annual licensing meeting” for that part of the division in which the house was situate, and that the notice was therefore served in time.—*Reg. v. Justices of Anglesey*, L.R. [1892] 1 Q.B. 850.

Local Government :—

- (v.) **Ch. D.**—*New Street—“Entrance”—Width of—Access by Public Street—Public Health Act, 1875, s. 157.*—The bye-laws of a local sanitary authority, duly confirmed by the Local Government Board, provided that: “Every person who shall construct a new street shall provide at

one end at least of such street an entrance of a width equal to the width of such street, and open from the ground upwards." *Held*, that a person proposing to construct a new street must provide a mode of access thereto of a width equal to the width of the new street; and that if the access to the new street was by a public street which was not of the required width the requirements of the bye-laws were not fulfilled.—*Bromley Local Board v. Lloyd*, 66 L.T. 462.

- (i.) **C. A.**—*Street—Paving Expenses—Apportionment—Dispute—Arbitration—Public Health Act, 1875, s. 150.*—Where an urban authority has given notice to the owners and occupiers of premises abutting on a street to pave or sewer the same, and has executed the work in default of compliance with the notice, and the expenses have been apportioned, any dispute arising on the apportionment, whether as to amount or otherwise, must be dealt with by arbitration as provided by the Public Health Act, 1875, and the authority cannot recover the amount apportioned from any owner who has given notice that he disputes the apportionment.—*Sandgate District Local Board v. Keene*, L.R. [1892] 1 Q.B. 831.
- (ii.) **Q. B. D.**—*Rate—Default in Payment—Judgment in County Court—Bill of Sale Holder—Claim of—Public Health Act, 1875, ss. 256, 261—Bills of Sale Act, 1882, s. 14.*—Where proceedings to recover a rate have been taken in a county court, and not by distress warrant, goods included in a bill of sale cannot be seized in execution under a judgment for the amount of the rate.—*Local Board of Wimbledon v. Underwood*, L.R. [1892] 1 Q.B. 836; 40 W.R. 640.
- (iii.) **Q. B. D.**—*Removal of House Refuse—"House"—Clinkers from Furnace—Public Health Act, 1875, ss. 4, 42, 43.*—A local authority which has contracted for the removal of "house refuse" is not bound to remove clinkers from furnaces used to get up steam for the purposes of a laundry business and for heating the building where the business is carried on, such clinkers not being "house refuse" within the meaning of the sections above mentioned. A building used mainly as a steam laundry, and containing some rooms in which the workpeople live, is not a "house" within the meaning of those sections.—*London and Provincial Steam Laundry Co. v. Willesden Local Board*, 40 W.R. 557.

Lunatic:—

- (iv.) **Q. B. D.**—*Pauper—Maintenance—Order for Payment—Lunacy Act, 1890, ss. 287, 294.*—A person who had acquired exemption from removal by residence in the A. union became insane, and was sent to a pauper lunatic asylum. She was released on trial, and resided for about seven weeks with her relatives in another union, when she became worse, and was received again into the asylum. At the time of her release her mental incapacity was such that she could not exercise any independent choice of a residence. A magistrate's order was obtained *ex parte* directing payment by the A. union of the expenses of her removal to the asylum, and of her maintenance after she had been received there a second time. *Held*, that the order was right, as her temporary absence from the A. union, when she was incapable of choosing her residence, did not put an end to her status of irremovability. *Held*, also, that the order was rightly made *ex parte*.—*Reg. v. Bruce and Guardians of the Bromley Union*, L.R. [1892] 2 Q.B. 136.

Mandamus.—See *Metropolis Management*, p. 135, iii.

Marriage Settlement:—

- (i.) **C. A.**—*Infant—Repudiation—Effect of.*—See Vol. 16, p. 125, v. *Held*, that the settlement had not been repudiated by the husband within a reasonable time after attaining twenty-one years of age, and was, therefore, still binding on him.—*Carter v. Silber*, 61 L.J. Ch. 401; 68 L.T. 473.

Master and Servant:—

- (ii.) **Ch. D.**—*Breach of Confidence—Injunction.*—A clerk, after giving notice to leave the service of his employers, who were engine makers, compiled a table showing the dimensions of certain engines constructed by them. *Held*, that he could be restrained by injunction from publishing or communicating the same, as he had, in compiling it, abused the confidence which arises between master and servant from the fact of employment, that the servant will not use, except for the purposes of his service, the opportunities which that service gives him of gaining information.—*Merryweather v. Moore*, 66 L.T. 719; 40 W.R. 540.
- (iii.) **C. A.**—*Employer's Liability Act, 1880, s. 1, sub-s. 1—"Way."*—See Vol. 17, p. 94, i. *Held*, that the place where the plaintiff was injured was a "way," but that there was no "defect in the condition of the way" but merely a negligent user thereof by the defendant's foreman.—*Willetts v. Watts & Co.*, L.R. [1892] 2 Q.B. 92; 40 W.R. 497.
- (iv.) **C. A.**—*Negligence—Fellow-Workman—"Person to whose Orders or Directions the Workman is Bound to Conform"*—*Employer's Liability Act, 1880, s. 1, sub-ss. 2, 3.*—Decision of Q. B. D. (see Vol. 17, p. 52, i) reversed.—*Wild v. Waygood & Co.*, L.R. [1892] 1 Q.B. 783; 61 L.J. Q.B. 391; 66 L.T. 309; 40 W.R. 501.

Mayor's Court:—

- (v.) **Q. B. D.**—*Equitable Jurisdiction.*—The Mayor's Court, London, has no equitable jurisdiction unless the whole of the cause of action has arisen within its jurisdiction.—*Reg. v. Lord Mayor of London*, 61 L.J. Q.B. 329.

Medical Practitioner:—

- (vi.) **Q. B. D.**—*Licentiate of Apothecaries Society—Pretending to be Physician, &c.*—*Medical Act, 1858, s. 40.*—A person who is a registered Licentiate of the Society of Apothecaries, but is not qualified to be registered as physician, surgeon, or M.D., placed M.D. after his name on vaccination certificates, and in other ways described himself as "M.D.," "Physician," and "Surgeon," and in some other cases added "legally registered practitioner." *Held*, that he could be convicted of falsely pretending to be a doctor of medicine, physician, and surgeon.—*Reg. v. Baker*, 66 L.T. 416.

Merger:—

- (vii.) **Ch. D.**—*Intention—Legal and Equitable Estates—"Merger by Operation of Law Only"*—*Judicature Act, 1873, s. 25, sub-s. 4.*—Real estate was devised by T. to the use of E. for life, with remainder to the use of her sons successively in tail male, and, in default of issue, to the use of C. for life with remainders over. E. conveyed the real estate to C., his heirs and assigns, during all the remainder of her life, to the use that she should receive an annuity, which C. covenanted to pay. The legal estate in the larger part of the real estate was at the death of T., and since remained, outstanding. C. predeceased E. *Held*, that

there was a clear intention shewn on the face of the conveyance that the life estate of E. should not merge in that of C., and consequently that the conveyance did not operate so as to create a merger either at law or in equity.—*Snow v. Boycott*, 40 W.R. 603.

Metropolis Management :—

- (i.) **Ch. D.**—*Building Line—Vacant Ground—Re-building—Metropolis Management Act, 1862, ss. 74, 75.*—Where land formerly built on has been abandoned as a building site, the 75th section of the Act is applicable in case of re-building. In such a case the certificate of the superintending architect of the London County Council is conclusive as to the building line, subject only to an appeal to the special tribunal under the London County Council Act, 1890. Where a former owner had purchased houses and pulled them down, and thrown the site into an open garden, *held*, that the old building site had been abandoned, and that there was no jurisdiction to interfere with the architect's certificate as to the new building line.—*Worley v. Vestry of St. Mary Abbott's, Kensington*, 40 W.R. 566.
- (ii.) **Q. B. D.**—*Building Line—School Board—Special Statutory Powers.*—Where the London School Board is empowered by a special Act to acquire a particular site, defined by metes and bounds, for the purpose of providing school accommodation, they take the site freed from the restriction imposed by the Metropolis Management Act, 1878, which forbids building within twenty feet of the centre of a highway.—*London County Council v. School Board for London*, 40 W.R. 604.
- (iii.) **Q. B. D.**—*Church Rate—Rector's Stipend—Penalty—Mandamus—18 & 19 Vict., c. 120, s. 90; 19 & 20 Vict., c. 112, s. 3.*—An old local Act required a parish vestry to raise a sum by a rate on the parish to pay the rector's stipend, and in default to forfeit and pay to the rector a certain sum for every offence, recoverable as in the Act mentioned. *Held*, that the power of making the rate was transferred to the elected vestry, and that a prerogative writ of mandamus lies to compel the vestry to make the rate, although a penalty and forfeiture was provided for by the Act.—*Reg. v. Vestry of St. George the Martyr, Southwark*, 61 L.J. Q.B. 398.
- (iv.) **C. A.**—*Paving—"New Street"—Metropolis Management Acts, 1855, s. 105; 1862, s. 112.*—An old country highway, which becomes, in the ordinary and popular sense of the term, a "street," by the erection of buildings fronting it, shortly before or after the passing of the Act of 1855, is a "new street" within that Act, and the expenses of paving it may be charged on the owners.—*Vestry of St. Giles, Camberwell, v. Crystal Palace Co.*, L.R. [1892] 2 Q.B. 33.
- (v.) **Q. B. D.**—*Vestryman—Qualification—18 & 19 Vict., c. 120, s. 6; 19 & 20 Vict., c. 112, s. 8.*—W. was tenant of premises which appeared in the rate-book as of a rateable value of £125. He sublet a part of such premises, and occupied the remainder. The part which he occupied was of a rateable value of not less than £40, but was not separately assessed in the rate-book. He occupied no other premises in the parish. *Held*, that he was not qualified to be elected as a vestryman.—*Gordon v. Williamson*, L.R. [1892] 1 Q.B. 616; 40 W.R. 496.
- (vi.) **Q. B. D.**—*Wooden Structure—Builder's Pay Office—Licence—Metropolis Management & Building Amendment Act, 1882, s. 13.*—A structure on wheels which forms part of a builder's plant, and is intended for use as

a pay office during building operations, is not such a wooden structure as requires a licence from the London County Council.—*London County Council v. Pearce*, L.R. [1892] 2 Q.B. 109; 66 L.T. 685; 40 W.R. 543.

Mine.—See Canal, p. 118, ii.

Mortgage:—

- (i.) **H. L.**—*Equitable Mortgages—Postponement of First—Negligence.*—Decision of C. A. (see Vol. 16, p. 50, vi.) affirmed.—*Taylor v. Russell* L.R. [1892] A.C. 244; 66 L.T. 565.
- (ii.) **Q. B. D.**—*Equitable—Priority—Debentures—Negligence.*—A company issued debentures purporting to charge "its undertaking and all its property, both present and future," and containing a condition that the charge should be "a floating security," and that the company should not be "at liberty to create any mortgage or charge in priority to the said debentures." The company afterwards obtained a loan on mortgage of its interest in a fund due to it. The mortgagee's solicitor knew of the debentures, but having been told by the managing director that there was no incumbrance which would have priority to the mortgage did not ascertain the form of the debentures, and was not aware of the restriction on the power to create a charge in priority to them. *Held*, that as debentures did not necessarily affect the title, the omission to ascertain the terms of the debentures was not such negligence as to affect the mortgagee with notice of the restriction, and to prevent him from gaining priority over the debentures by being first to give notice to the holders of the mortgaged fund.—*English and Scottish Mercantile Investment Trust v. Brunton*, L.R. [1892] 2 Q.B. 1. See Bill of Sale, p. 117, i.

Municipal Corporation:—

- (iii.) **Q. B. D.**—*Mistake in Burgess Roll—Mandamus to Correct.*—The names of several burgesses having been entered by mistake in the wrong ward rolls, and the fact not having been brought to the notice of the revising barrister, and the attention of the town clerk not having been called to it until some days after the burgess roll had been published, a mandamus to compel the town clerk to correct the burgess roll was refused.—*F. p. Keay; in re Town Clerk of Eastbourne*, 66 L.T. 323.

Navy:—

- (iv.) **C. A.**—*Officer—Right to Resign Commission—Naval Discipline Act, 1866, ss. 19, 87.*—An engineer officer in the Royal Navy who has accepted a commission, and is borne on the books of a ship in commission, cannot resign his commission without the consent of the Lords Commissioners of the Admiralty. *Seemle*, that a naval officer cannot under any circumstances resign his commission without permission.—*Hearson v. Churchill*, L.R. [1892] 2 Q.B. 144; 40 W.R. 615.

Negligence:—

- (v.) **C. A.**—*Concealed Danger—Personal Liability.*—The defendant, a master lighterman, contracted to convey goods to a ship, and supplied a barge for the purpose. He contracted with another person to take his barge to the ship and return it when unloaded. The plaintiff was employed by a stevedore to unload the barge. In the course of the unloading, and after dark, he fell through the hatchway of the cabin for which the defendant had not supplied a cover, and was injured. *Held*, that it was no part of the defendant's duty to supply a cover for the hatchway, and that he was not liable.—*O'Neill v. Everest*, 61 L.J. Q.B. 453; 66 L.T. 396.

Patent:—

- (i.) **C. A.**—*Amendment—Condition Imposed—Written Assent to—Action Pending—Effect of—Patents, &c., Act, 1883, s. 18, sub-s. 10.*—Decision of Ch. D. (*see* Vol. 17, p. 96, ii.) affirmed.—*Andrew v. Crossley*, L.R. [1892] 1 Ch. 492; 66 L.T. 571; 40 W.R. 536.
- (ii.) **C. A.**—*Right of Owner of a Share to work Patent without Accounting for Profits.*—*Semble*, that the owner of a definite share in a patent is entitled to work the patent without accounting for the profits to his co-owners.—*Steers v. Rogers*, L.R. [1892] 2 Ch. 13; 66 L.T. 502.
- (iii.) **Ch. D.**—*Validity—Provisional and Complete Specifications—Variance.*—A patentee must, in his provisional specification, describe the nature of his invention, though he need not go into detail. In his complete specification, when going into detail, he must describe the same invention; otherwise the patent is void, although the variation is caused by the operation of a disclaimer amending the complete specification. In the provisional specification of a patent for improvement in electric lighting, the patentee claimed an invention for keeping the electro-motive force constant in the mains by means of secondary batteries, and for regulating the force by electrometers. In the complete specification, as amended by disclaimers, he claimed for the secondary batteries the power of regulating the force, as well as of keeping it constant in the mains. *Held*, that the two specifications did not describe the same invention, and that the patent was void.—*Lane Fox v. Kensington and Knightsbridge Electric Lighting Co.*, L.R. [1892] 2 Ch. 66.

Poor Law:—

- (iv.) **C. A.**—*Rating—Beneficial Occupation—Possible Tenants—Sewers.*—The Metropolitan Board of Works had, under their statutory powers, constructed sewers in the parish of W. for the purpose of the Metropolitan main drainage, which were now vested in the appellants. The sewers having been rated to the poor rate of the parish, it was found, in a case stated by Quarter Sessions upon appeal against the rate, that the sewers were incapable of yielding a profit; but that if they were not in the possession of the appellants, but in the hands of a private owner, and connected with the Metropolitan sewage system, and were let to the appellants as tenants, they would be willing to pay a yearly rent for the same to be used as part of, and in connection with, the sewage system. *Held*, that the appellants had no power legally to become tenants of the sewers, and could not be considered as possible tenants; that the sewers were not capable of a beneficial occupation, and were not rateable.—*London County Council v. Churchwardens, &c., of West Ham*, L.R. [1892] 2 Q.B. 44.
- (v.) **Q. B. D.**—*Rating—Owner Rated—No Special Allowance—Validity—Sturges Bourne's Act (59 Geo. III., c. 12), s. 19—Poor Rate Assessment and Collection Act, 1869, ss. 3, 4.*—Section 19 of the former Act has been repealed by the latter Act. A rate made on the owner, instead of the occupier, of houses let at a rent not exceeding £20 and not less than £6 a-year, in which no special allowance is made to the owner, is bad.—*Churchwardens, &c., of West Ham v. Fourth City Mutual Building and Investment Society*, L.R. [1892] 1 Q.B. 654; 61 L.J. M.C. 128; 66 L.T. 350; 40 W.R. 446.
- (vi.) **Q. B. D.**—*Rating—Owner Instead of Occupier—Value of Tenements—Poor Rate Assessment and Collection Act, 1869, ss. 3, 4.*—The vestry of a parish are only entitled under the Act above-mentioned, to the rate

owner of a tenement to be rated instead of the occupier so long as the rateable value of the tenement does not exceed the limits specified in section 3.—*Overseers of Norwood v. Salter*, L.R. [1892] 2 Q.B. 118.

- (i.) **Q. B. D.**—*Settlement—Residence Apart from Parent while under Sixteen—Divided Parishes Act, 1876, s. 34.*—A pauper had resided from the age of fourteen to eighteen in the W. union. Her father was dead, and her widowed mother resided outside that union. *Held*, that the time during which the pauper was under sixteen should be reckoned in determining whether she had resided in the parish for the term of three years, under such circumstances in each of such years as would render her irremovable, and that she had therefore acquired a settlement in the W. union.—*Guardians of West Ham Union v. Churchwardens, &c., of the Parish of St. Matthew, Bethnal Green*, L.R. [1892] 2 Q.B. 65.

Practice:—

- (ii.) **C. A.**—*Appeal—Costs—Judicial Separation—Wife's Costs—Discretion of Court—Matrimonial Causes Act, 1857, s. 51—Judicature Act, 1873, s. 49.*—An order having been made in a wife's suit for judicial separation that the costs should be paid by her, her solicitor applied for taxation and payment of her costs to the extent of a bond given by the husband under the usual order for security. The President refused the application, on the ground that the wife had the means of paying the costs herself. *Held*, that the matter was within his discretion, the solicitor having no greater right to the costs than the wife had, and that there was no appeal.—*Russell v. Russell*, L.R. [1892] P. 152; 61 L.J. P. 45; 61 L.T. 436.
- (iii.) **Q. B. D.**—*Attachment—Unqualified Person Acting as Solicitor—Refusal to Deliver up Documents and Render Account.*—L. had been introduced to A. as a solicitor, and while acting for A. as such had received from him documents and money. He was ordered to deliver up the documents, and to render an account of the money, and failed to do so. On an application for a writ of attachment against him for such failure, he set up, for the first time, the excuse that he was not a solicitor. *Held*, that there was jurisdiction to order him to deliver up the documents and to render the account, and that the writ of attachment ought to issue.—*In re Hulme and Lewis*, 66 L.T. 683.
- (iv.) **C. A.**—*Costs—Judgment in Default of Defence—Disallowance of Costs—Discretion—Appeal—R.S.C., 1883, O. xxvii, r. 11; O. lxx, r. 1.*—Where judgment is given for the plaintiff in default of defence, the judge has a discretion as to costs, and the Court of Appeal will not interfere with the exercise of such discretion, unless there has been a disregard of principle or misapprehension as to facts.—*Young v. Thomas*, L.R. [1892] 2 Ch. 134; 66 L.T. 575; 40 W.R. 468.
- (v.) **Ch. D.**—*Costs—Second Action—Same Cause of Action—Stay of Proceedings—R.S.C., 1883, O., xxvi, r. 4.*—A., in 1891, took possession of the house of X. A. gave up the house, and X. brought an action against him in the Queen's Bench Division, claiming damages for trespass. A. stated in his defence, that he was in possession in 1891, and that if X. was in possession his possession was wrongful. A. withdrew his defence, and was ordered to pay the costs of the action. A. then commenced an action in the Chancery Division asking for a declaration that he was entitled to the house, and for possession. *Held*, on a summons by X., that the cause of action was substantially

the same as that in the former action, and that proceedings should be stayed till payment of the costs in the former action.—*Hall v. Paulet*, 66 L.T. 645.

- (i.) **H. L.**—*Costs—Pauper—Taxation*.—On the taxation of a pauper appellant's costs on a successful appeal to the House of Lords the fees of the House and the fees of counsel are to be disallowed, and the solicitor is to have his costs out of pocket, with a reasonable allowance to cover office expenses, including clerks, &c.—*Johnson v. Lindsay*, L.R. [1892] A.C. 110.
- (ii.) **C. A.**—*Costs—Taxation—Judgment for £50—Scale—R.S.C.*, 1883, O. lxx., r. 12—*County Courts Act*, 1888, s. 116.—A plaintiff, who in an action of contract in the High Court which might have been brought in the county court, recovers judgment for £50. is not entitled to costs on the High Court scale; unless a judge of the High Court certifies that there was sufficient reason for bringing the action in that Court, or unless the Court or a judge by order allows costs on the High Court scale, or unless the plaintiff has recovered judgment under Order xiv.—*Millington v. Harwood*, 66 L.T. 576; 40 W.R. 481.
- (iii.) **Q. B. D.**—*County Court—Appeal from—Misdirection—Judge's Notes—County Courts Act*, 1888, s. 120—*R.S.C.*, 1883, O. lix., r. 8.—An application to the judge of a county court at the trial for a note on any point of law, and of the facts in evidence relating thereto, and of his decision thereon, is the condition precedent for the hearing of any appeal from such decision. The High Court may admit any evidence or statement of what has occurred other than such notes of the judge, only when such an application has been made at the trial, but no notes of the judge are forthcoming.—*Cook v. Gordon*, 61 L.J. Q.B. 445.
- (iv.) **C. A. & Q. B. D.**—*Discovery—Action for Penalties—Patents, &c., Act*, 1883, s. 58.—The plaintiff, in an action to recover the statutory penalty for the infringement of a registered design, may not interrogate the defendant.—*Saunders v. Wiel*, L.R. [1892] 2 Q.B. 18; 40 W.R. 594.
- (v.) **Q. B. D.**—*Discovery of Documents—Privilege*.—The plaintiffs sued the defendants for money paid by them on behalf of the defendants as agents for the sale of goods consigned to Australia. The defendants alleged that the goods were consigned to the plaintiffs as purchasers, and not as agents for sale. The plaintiffs' manager and representative in his affidavit of documents claimed privilege for "letters and other communications from the plaintiffs' house in Melbourne to the London house, and press copy letters and other communications *vice versa*," which letters, communications, and press copies were stated in the affidavit to relate exclusively to the case of the plaintiffs, and not to support or tend to support that of the defendants, and not to contain anything impeaching the case of the plaintiffs. *Held*, that the documents were not privileged.—*McLean Bros. & Rigg v. F. Jones & Co.*, 66 L.T. 653.
- (vi.) **C. A.**—*Discovery—Affidavit of Documents—Sealing-up Entries—Bankers' Books—Subpoena—Bankers' Books Evidence Act*, 1879, s. 7.—The plaintiff, having been ordered to produce for inspection documents in her possession relating to the matters in question, produced the pass books of her banking account, sealing up portions which were, as she deposed, not relevant. Application was made by the opponents for an order authorising them to inspect the books, or in the alternative for leave to issue a subpoena *duces tecum* to the officers of the bank to produce the books containing the plaintiff's account. *Held*, that the order must be refused, as the Act did not deprive a party of his right

to refuse discovery of entries in his banker's books on the ground that they were irrelevant, and that it was a matter for the discretion of the judge at the trial whether a subpoena *duces tecum* should be issued.—*Parnell v. Wood*, L.R. [1892] P. 137; 66 L.T. 670; 40 W.R. 564.

- (i.) **Q. B. D.**—*Discovery—Libel—Mitigation of Damages*.—In an action for libel, in respect of letters written by the defendant reflecting on the plaintiff's credit and commercial character, the defendants proposed to give evidence in mitigation of damages. They interrogated the plaintiff, asking for details of cheques dishonoured, of executions levied, of distress for rent, of actions against the plaintiff for goods sold and delivered, and of judgments recovered therein against him. *Held*, that the interrogatories were relevant to the plaintiff's character and reputation, and must be answered.—*Scaife v. Kemp*, 66 L.T. 589.
- (ii.) **C. A.**—*Discovery—Person Interested—Not Party to Action*.—The Court will stay all proceedings in an action until discovery of documents shall have been made by a person, not being a party to the action, on whose behalf the action has been brought.—*Willis v. Baddeley*, 40 W.R. 577.
- (iii.) **Ch. D.**—*Discovery—Trade Mark—R.S.C.*, 1883, O. xxxi., r. 12.—A. sought to register a trade mark, and was opposed by B. A. then gave notice of motion to expunge two marks of B. from the register. He had made a statement in writing of the grounds of his application. The evidence was all put in, but A. and B. were to be cross-examined in Court. A. took out a summons that B. might be ordered to make an affidavit of documents "relating to the matters in question herein." *Held*, that the usual order for discovery of documents should be made, except that the documents should be limited to those relating to certain questions defined by the Court. *Held*, also, that B. should not be bound to set forth all the labels or documents constituting a class, but that it should suffice as regards each class of labels or other documents to mention a specimen or specimens fairly representative of the class.—*In re Will's Trade Mark*, 66 L.T. 494.
- (iv.) **Q. B. D.**—*Garnishee—Balance of Money in Hands of Agent for Benefit of Creditors—R.S.C.*, 1883, O. xlv., r. 1.—Where money has been paid by a debtor to an agent for the benefit of his creditors, and he has taken no step to revoke the trust so created, a judgment creditor of the debtor has no right to attach the money in the hands of the agent as a debt due to the debtor.—*Roberts v. Jones*, 66 L.T. 617; 40 W.R. 573.
- (v.) **H. L.**—*Garnishee Order—Affidavit—Information and Belief—Particular Debt—R.S.C.*, 1883, O. xlv., r. 1.—Decision of C. A. (see Vol. 16, p. 92, iv.) affirmed.—*Vinall v. de Pass*, L.R. [1892] A.C. 90; 66 L.T. 422.
- (vi.) **H. L.**—*Garnishee Order—Moneys in Hand of Banker—Excess over Judgment Debt—R.S.C.*, 1883, O. xlv., r. 1.—Decision of C. A. (see Vol. 14, p. 122, ii.) affirmed.—*Rogers v. Whiteley*, L.R. [1892] A.C. 118; 66 L.T. 303.
- (vii.) **Q. D. B.**—*Mandamus—Discharge of Rule—New Rule moved for on Fresh Materials*.—Where a rule *nisi* for a mandamus has been discharged on the ground that the affidavits do not shew a previous demand and refusal to perform the duty sought to be enforced, a second application for the same object founded on fresh materials will not be entertained.—*Reg. v. Mayor of Bodmin*, L.R. [1892] 2 Q.B. 21; 66 L.T. 562; 40 W.R. 606.
- (viii.) **C. A.**—*Parties—Adding Defendant—Patent—R.S.C.*, 1883, O. xvi., r. 11.—In an action by a patentee against the user of a machine which he alleged was an infringement of his patent, X. claimed to be joined as a defendant, on the ground that he was the manufacturer and

patentee of the machine used by the defendant, and would be injured by a judgment against the defendant. *Held*, that as X. would be affected only indirectly by the result of the action, there was no jurisdiction to add him as defendant.—*Moser v. Marsden*, L.R. [1892] 1 Ch. 487; 61 L.J. Ch. 319; 66 L.T. 570; 40 W.R. 520.

- (i.) **C. A.**—*Pleading—Amendment—Admission—Withdrawal of*.—G., one of two defendants, who were in partnership, admitted in his defence and in his answers to interrogatories, that a sum of £2,000, the subject of the plaintiff's claim, had been received by his partner and paid into the banking account of the firm. On such admission an order was made for payment of the sum into Court. G. applied for the discharge of such order, and swore that his admissions had been made by mistake, and that the sum had not in fact been paid into the banking account. There was evidence that it had been so paid. *Held*, that as a condition of being allowed to amend his defence and withdraw his admissions, G. ought to be ordered to pay the sum into Court.—*Hollis v. Burton*, 40 W.R. 610.
- (ii.) **P. D.**—*Receiver—Divorce—Co-Respondent Condemned in Costs—Death*.—R.S.C., 1883, O. xvii., r. 4; O. xlii., r. 28.—A decree absolute for divorce had been made on a husband's petition, and the co-respondent condemned in costs. He died intestate before payment. The Court appointed the petitioner receiver of his estate, but directed that the order should not be drawn up for a week, in order that his widow might decide whether she would take out administration, and give security for the debt.—*Waddell v. Waddell*, L.R. [1892] P. 226.
- (iii.) **Ch. D.**—*Receiver—Motion—Summons*.—Motion for appointment of a receiver of the property of two defendants to obtain payment of costs, which they had been ordered to pay. *Held*, that the applicants were justified in applying by motion in accordance with the practice of the Chancery Division. *Quere*, whether in future such applications should not be made by summons in chambers. Receiver appointed, as it did not appear that the defendants possessed sufficient property available for obtaining payment in any other way.—*Nuttall v. Whittaker*, 66 L.T. 588.
- (iv.) **C. A.**—*Parties—Ship—Substituting Plaintiffs*.—R.S.C., 1883, O. xvi., rr. 2, 11.—In an action of damage in the Admiralty Division, after the decree pronouncing the defendant's ship alone to blame, and before the assessment of damages, it appeared that the name of one of the plaintiffs had been inserted in the record by mistake. *Held*, that the Court had jurisdiction to substitute the name of the right plaintiff.—*The Duke of Buccleugh*, 61 L.J. P. 57; 40 W.R. 455.
- (v.) **C. A. & Ch. D.**—*Trade Mark—Register—Rectification of—Foreigner—Service*.—F. K. & Co., a limited company whose registered office was in Ireland, had registered a trade mark. A. moved to remove the same from the register. He served notice of motion on the Comptroller-General, and sent a copy of the notice to F. K. & Co., intimating that it was sent to inform them that proceedings had been commenced which might affect their interests. F. K. & Co. did not appear. *Held*, that A. had acted rightly in sending them informal notice of the proceedings, and that leave of the Court to do so was not necessary. *Held*, also, that the motion might be heard as against the Comptroller-General.—*In re Frederick King & Co.*; *Trade Mark No. 87,133*, 66 L.T. 489; 40 W.R. 580.
- (vi.) **C. A. & Ch. D.**—*Trade Mark—Register—Rectification—Motion Heard in Absence of Owner of Mark—Amendment—Affidavits*.—R.S.C., 1883, O. v., r. 9 (c).—*Held*, that the motion to rectify the register (see preceding

case) has been rightly heard in the absence of F. K. & Co., and that the alteration made in the notice of motion by striking them out as respondents was not a material alteration. *Held*, also, that the alteration of the date of the notice of motion, with the addition of no new matter, did not necessitate the issue of a new notice of motion; that it was not necessary to obtain the leave of the Court to use at the hearing affidavits filed prior to the alteration of the notice of motion; and that an affidavit used on a motion, but not filed till afterwards, may be entered in the order as read, though the fact of its not having been filed has not been brought to the notice of the Court, provided the date of the order is not interfered with, as where the filing is on the same day.—*In re Frederick King & Co.; Trade Mark No. 87,133 (No. 2)*, 66 L.T. 491; 40 W.R. 580.

- (i.) **C. A.**—*Service—Scotch Corporation—Office in England—Service on Official—Companies Clauses Act, 1845, s. 135.*—Decision of Q. B. D. (see Vol. 17, p. 101, iii.) reversed.—*Palmer v. Caledonian Railway*, L.R. [1892] 1 Q.B. 823; 40 W.R. 562.
- (ii.) **C. A.**—*Writ—Service out of the Jurisdiction—Contract to be Performed Partly Abroad and Partly in this Country—R.S.C., 1883, O. xi., r. 1 (e).*—The plaintiff, a merchant in London, and the defendant, a merchant in Germany, agreed by letters that the plaintiff should consign goods to the defendant to sell in Germany on his account. The plaintiff was to fix the price, and payment was to be in "cash against bills of lading." The defendant had remitted to London part of the money due for goods consigned, and the plaintiff sued for the balance. *Held*, that the true inference was that payment was to be made in this country, and that service of the writ out of the jurisdiction ought to be allowed.—*Rein v. Stein*, L.R. [1892] 1 Q.B. 753; 61 L.J. Q.B. 401; 66 L.T. 469.
- (iii.) **C. A.**—*Writ—Special Indorsement—Action by Assignee of Mortgage—Statement of Notice to Debtor—R.S.C., 1883, O. iii., r. 6; O. xiv., r. 1.*—The indorsement on a writ stated that the claim was for a certain sum of principal and interest due to the plaintiff as assignee of a mortgage debt due from the defendant, but did not state that express notice in writing of the assignment had been given to the defendant. *Held*, that it was a good special indorsement, and that leave to enter final judgment might be given.—*Satchwell v. Clarke*, 66 L.T. 641.
- (iv.) **Q. B. D.**—*Writ—Special Indorsement—Common Money Bond—4 & 5 Anne, c. 16, ss. 12, 13—R.S.C., 1883, O. iii., r. 6; O. xiv.*—It is competent for the plaintiff in an action on a common money bond within the meaning of 4 & 5 Anne, c. 16, s. 12, to indorse his writ specially and obtain final judgment under O. xiv.—*Gerrard v. Clowes*, L.R. [1892] 2 Q.B. 11.
- (v.) **Q. B. D.**—*Writ—Special Indorsement—Interest—"Liquidated Demand"*—*R.S.C., 1883, O. iii., r. 6; O. xiv., r. 1.*—Interest was claimed on a specially indorsed writ, but the indorsement did not show that the interest was payable either by agreement or by statute. *Held*, that this was not a good special indorsement, and that the Court would not go behind it to ascertain by evidence whether the interest was or was not in fact payable by agreement.—*Gold Ores Reduction Co. v. Parr*, L.R. [1892] 2 Q.B. 14; 66 L.T. 687; 40 W.R. 526.

Railway:—

- (vi.) **C. A.**—*Undue Preference—Rival Traders—Access to Competing Lines.*—In determining whether mileage rates charged by a railway company

to one trader on a lower scale than to another do or do not amount to an undue preference, the Court may take into consideration the fact that one of the traders has access to a competing line of railway.—*Phipps v. L. & N.W.R.*, 61 L.J. Q.B. 379.

Restraint of Trade:—

- (i.) **C. A.**—*Contract—Validity.*—The plaintiffs, merchants in London, employed the defendant as a clerk under an agreement which provided that the defendant should not “accept another situation as clerk or agent, or establish himself within a radius of fifteen miles from the London Royal Exchange” without the written permission of the plaintiffs for three years after leaving their employment; but such permission was not to be withheld if it should be proved to the satisfaction of the plaintiffs that the sought-for clerkship or agency was not with or for a firm trading with or dealing in the same class of goods as those of the plaintiffs; and, further, if it should be proved that the defendant would, after establishing himself, deal in goods other than those of the plaintiffs’ for at least three years. *Held*, that the agreement was unreasonable and invalid, as it would preclude the defendant from taking any situation or entering any business within the limits mentioned without the plaintiffs’ consent.—*Pells & Co. v. Saalfeld*, L.R. [1892] 2 Ch. 149; 66 L.T. 666; 40 W.R. 548.

Revenue:—

- (ii.) **C. A.**—*Corporation Duty—Income Applied under Act of Parliament—Charitable Purposes*—48 & 49 Vict., c. 51, s. 11, *Exemption Clauses* 2 & 3.—Decision of Q. B. D. (see Vol 17, p. 26, iii.) affirmed.—*In re Duty upon Bootham Ward Strays*, 40 W.R. 632.
- (iii.) **H. L.**—*Income Tax—“Profits and Gains”—Beneficial Occupation of House—Income Tax Act, 5 & 6 Vict., c. 35, Scheds. D & E.*—X. was manager of a bank, and as such occupied, rent free, a house forming part of the bank premises, which was of the annual value of £50. It was part of his duty to occupy the house, and he could not let it, or vacate it even for a time without the consent of the directors. His occupation would cease on the determination of his employment. The house was suitable for a residence, and he would have required another of the same value if it had not been provided for him. *Held*, that the annual value of the house was neither “profits and gains,” nor “perquisites, profits or emoluments,” and could not be reckoned as part of X.’s income; so that, his income in money amounting to £374, he was entitled to abatement of tax, as having an income of less than £400.—*Tennant v. Smith*, L.R. [1892] A.C. 150; 61 L.J. P.C. 11; 66 L.T. 327.
- (iv.) **Q. B. D.**—*Stamp Duty—Promissory Note—Joint and Several—Principal and Surety—Provision as to Giving of Time.*—A joint and several promissory note, made by a principal and surety, contained a clause which provided that the holder might give time to either party without prejudice to his rights against the other. *Held*, that such clause did not make it requisite that the instrument should be stamped as an agreement.—*Yates v. Evans*, 61 L.J. Q.B. 446; 66 L.T. 332.

River:—

- (v.) **Q. B. D.**—*Pollution—Sewer Vested in Local Authority—Form of Appeal from County Court—Rivers Pollution Act, 1876, ss. 3, 11—County Courts Act, 1888, ss. 120, 124.*—The defendants, manufacturers employing many hands, discharged sewage into a natural watercourse, which had become vested in the plaintiffs as a sewer. This sewer communicated with a stream which it polluted. The plaintiffs obtained an order from the county court judge, requiring the defendants to abstain from

polluting the stream. *Held*, that the defendants were not the persons who were responsible for pouring the sewage into the stream. *Held*, also, that the appeal from the county court was properly made by motion, and not by special case.—*Kirkheaton Local Board v. Ainley*, 66 L.T. 340.

Sale of Goods:—

- (i.) **C. A.**—*Memorandum in Writing—Statute of Frauds, s. 17—Acceptance.*—A verbal contract was made for the sale of timber at a price exceeding £10. The timber was conveyed by a carrier, named by the purchaser, to the carrier's wharf, and an advice note was sent to the purchaser, which described the timber as in the invoice. The purchaser inspected the timber, and wrote across the advice note and signed the following statement: "Refused. Not according to representation." He notified his refusal to the vendor ten days afterwards. *Held*: (1) that there was no sufficient connection between the advice note and the invoice to constitute a memorandum in writing of the contract; and (2) that there was no acceptance within the statute of frauds.—*Taylor v. Smith*, 61 L.J. Q.B. 331; 40 W.R. 486.
- (ii.) **Q. B. D.**—*Stoppage in Transitu—Bankruptcy—Fraudulent Preference.*—The purchaser of goods, part of the cargo of a ship at sea, being unable to meet his acceptances given in exchange for bills of lading indorsed in blank, and desiring to cancel the contract, telegraphed to the vendor to appoint an agent to receive the goods, and returned the bills of lading. The vendor's agent stopped the delivery of the goods, which were afterwards taken in execution by a judgment creditor of the purchaser, who became bankrupt. *Held*, by Williams, J., that the delivery of the bills of lading to the vendor was a fraudulent preference, and that the trustee in bankruptcy of the purchaser thereupon became entitled to the goods, and that the vendor, by resuming dominion over the goods, lost his right of stoppage *in transitu*. *Held*, by Collins, J., that, whether the delivery of the bills of lading was a fraudulent preference or not, it did not revert in the vendor, either the property, or the dominion over the goods, and did not destroy his right of stoppage *in transitu*.—*E. p. Ferd-Baller & Co.; in re O'Sullivan*, 61 L.J. Q.B. 228; 66 L.T. 619.

Savings Bank:—

- (iii.) **Ch. D.**—*Winding-up—Liability of President—Savings Banks Act, 1863, s. 11.*—The Marquis of B. had, since the death of his father, at which time he was six months old, been president of the C. Savings Bank. He was never formally elected, had only once attended a meeting of the bank, and had never taken any part in the management, though his name as president had always appeared in the rules, reports, &c., of the bank. The actuary of the bank was enabled, owing to the disregard by the trustees and managers of the rules of the bank, and the provisions of the Act above mentioned, to appropriate large sums of money. The company was wound up. *Held*, that the Marquis of B. was one of the trustees and managers, but that, as he was ignorant of the irregularities, and as nothing had happened to call his attention to them, he could not be made liable.—*In re Cardiff Savings Bank; Marquis of Bute's Case*, L.R. [1892] 2 Ch. 100; 61 L.J. Ch. 357; 66 L.T. 317; 40 W.R. 538.

Settled Land:—

- (iv.) **Ch. D.**—*Building Lease—Consideration for—Settled Land Act, 1882, s. 7, sub-s. (2), s. 8, sub-s. (1).*—A tenant for life may not grant a lease under the statutory power in consideration of a past voluntary

expenditure by the lessee; the consideration for a lease under such power must be a consideration in law made on request or in pursuance of a contract.—*In re Chawner's Settled Estates*, L.R. [1892] 2 Ch. 192; 61 L.J. Ch. 331; 40 W.R. 538.

- (i.) **Ch. D.**—"Improvements"—*Parliamentary Opposition—Improvements before Act—Settled Land Acts, 1882, ss. 21, 25, 26, 36; 1890, s. 15.*—A deceased tenant for life had advanced money to pay the costs of certain improvements on a settled estate, and the costs of opposing, in the interests of the estate, certain Bills in Parliament. The money was secured by the bonds, now payable, of the present tenant for life. Some of the improvements were executed before the Settled Land Act, 1882. No scheme of the improvements was submitted. *Held*, that the costs of the Parliamentary opposition, and of the improvements executed since the Act should be paid out of capital; but that with regard to the improvements executed before the Act, the Court would not relieve the tenant for life of liabilities which had been incurred with the intention of discharging them out of income.—*In re Ormerod's Settled Estates*, 40 W.R. 490.
- (ii.) **Ch. D.**—*Land Settled by Will—Money Settled by Deed to be Settled to same Uses—One Settlement—"Improvements"—Settled Land Acts, 1882, ss. 2, 21, 25, 26; 1890, s. 13.*—Land was settled by will, and money was settled by deed by the testator to be invested in land to be settled upon limitations identical with those of the will, except for two terms of years, since satisfied. The powers were not quite the same in the two instruments. *Held*, that the two instruments constituted one settlement for the purposes of the Act, and that capital money arising under the deed could be applied in executing improvements upon the land devised by the will.—*In re Byng's Settled Estates*, L.R. [1892] 2 Ch. 219; 40 W.R. 457.
- (iii.) **Ch. D.**—*Lease by Tenant by Curtesy—No Trustees of Settlement—Person dealing in Good Faith—Specific Performance—Settled Land Act, 1882, s. 20, sub-s. (2); s. 45, sub-s. (3), ss. 53, 54—Settled Land Act, 1890, s. 7, sub-ss. (i.), (ii.).*—A tenant by the curtesy, believing himself to be absolutely entitled, granted a building lease which contained no reference to his statutory power, but the terms of which were in accordance with the Act. There were no trustees of the settlement. The lessee did not investigate the title. He entered into a contract to sell the lease, and the purchaser objected that the lease was invalid. *Held*: (i.) that as there was an intention to grant a lease, and it could only operate under the Act, an intention to exercise the statutory power must be presumed; (ii.) that the non-existence of trustees of the settlement, and the default in giving of the notices required by the Act, were not defects in the title of the tenant for life; (iii.) that a person dealing in good faith with the tenant for life is exempt from enquiring whether trustees of the settlement are in existence; (iv.) that the lessee had dealt in good faith with the tenant for life, though he had constructive notice of his title; (v.) that where a title depends on a disputed question of fact, and the Court can come to a definite conclusion upon that question on the evidence before it, a decree for specific performance ought to be made.—*Mogridge v. Clapp*, 66 L.T. 558.

Sewers:—

- (iv.) **C. A. & Q. B. D.**—*Commission of—New Romney—Jurisdiction.*—The Guildhall and Assembly Rooms of the town of New Romney are not within the area of the jurisdiction of the commissioners of sewers of New Romney.—*Mayor, &c., of New Romney v. Commissioners of Sewers of New Romney*, L.R. [1892] 1 Q.B. 840.

Sheriff:—

- (i.) **C. A.**—*Execution—Concurrent Writs—Poundage—Extortion—Sheriffs Act, 1887, s. 29, sub-s. 2 (ii).*—Decision of Q. B. D. (see Vol. 17, p. 105, ii.) affirmed.—*Lee v. Dangar*, 66 L.T. 548; 40 W.R. 469.
- (ii.) **C. A.**—*Liability to Penalty—Wrongful Act of Bailiff—Sheriffs Act, 1887, s. 29, sub-s. 2 (d).*—A sheriff is not liable under the above section to a penalty for the wrongful act of his bailiff, who in executing a writ of *fi. fa.*, did not except from seizure the plaintiff's wearing apparel, bedding, and implements of trade to the value of £5.—*Bagge v. Whitehead*, 40 W.R. 472.
- See Bankruptcy*, p. 116, i.

Ship:—

- (iii.) **Q. B. D.**—*Cattle Carrying—Cleansing and Disinfecting—Contagious Diseases (Animals) Act, 1878, s. 32, sub-s. 21—Order in Council, Animals Order of 1886, Clause 100.*—Under the Order in Council above mentioned, no new cargo may be put on board of a vessel which has been carrying cattle, even in those parts of the vessel where no cattle have been carried, until all those parts with which animals or their droppings have been in contact have been cleansed and disinfected.—*Imay, Imrie & Co. v. Blake*, 66 L.T. 530.
- (iv.) **C. A.**—*Charter-party—Dead Freight—Full Cargo.*—The defendants chartered a ship from the plaintiffs under a charter-party, which provided that she should load a "full and complete cargo of sugar in hogsheads and (or) bags," and deliver the same on being paid freight at a specified rate. The plaintiffs claimed dead freight on the ground that a "full and complete cargo" had not been provided, inasmuch as the "lazarette" and "alleyways" had not been filled. The defendants had tendered both hogsheads and bags of sugar. The master put the bags into the hold, and the hogsheads were too large to be got into the "lazarette" and the "alleyways." *Held*, that the defendants were not liable for dead freight, as they had tendered enough sugar to make a "full and complete cargo," and the fact that it could not all be stowed was owing to the master having put all the bags into the hold. *Quare*, whether under the charter-party the charterers were bound to provide a cargo for the "lazarette," or the shipowners to receive it there.—*Furness v. Charles Tennant, Sons & Co.*, 61 L.T. 635.
- (v.) **C. A.**—*Charter-party—Demurrage—Custom of Port.*—A ship was chartered to take a cargo of oranges to H. "to be discharged at usual fruit berth as fast as the steamer can deliver, as customary, and where ordered by the charterers." On arrival at H. the ship was not allowed by the port authorities to moor at the usual fruit berth, and she was delayed four days. *Held*, that the charterers were not liable for the delay, which was caused by the custom of the port.—*Good, Floodman and Co. v. Isaacs & Sons*, 40 W.R. 629.
- (vi.) **Q. B. D.**—*Charter-party—Disablement of Ship—Duty of Owner to Complete Voyage.*—Where a shipowner has agreed by charter-party that his ship should proceed to a port of discharge unless prevented by excepted perils, and she has put into a port of refuge for repairs, the owner is liable in damages for abandoning the voyage at such port without the consent of the charterer, unless the effect of the excepted perils proves to have been such as to make it either physically impossible to complete the voyage, or so clearly unreasonable as to be impossible in a business point of view. In order to justify the

abandonment of the voyage on the latter ground, it must appear that the damage to the ship amounts to a constructive total loss.—*Assicurazioni Generali v. S.S. Bessie Morris Co.*, L.R. [1892] 1 Q.B. 571.

- (i.) **C. A.**—*Charter-party—Excepted Perils—Seaworthiness—Negligence of Master.*—A ship took in goods at O. for a voyage to G., under a charter-party which reserved liberty for the owners to fill up with dead-weight cargo for their own benefit, and contained a warranty of seaworthiness and an exception as to perils, one of which was “any act, neglect, or default whatever of the pilot, master, or crew.” Dead-weight cargo could not be obtained at O., and the ship went to H. to obtain it. There was not enough coal on board for the voyage to G., and the ship was, therefore, wrecked after leaving H. This was owing to the mistake of the master and engineer. *Held*, that the shipowner was liable for the loss of the cargo; as the ship was not seaworthy on leaving O., if the voyage was to be considered as a voyage from O. to G.; and was not seaworthy at the commencement of the last stage of the voyage, if it was to be considered as a voyage divided into stages; and the exception as to perils did not affect the warranty of seaworthiness.—*Thin v. Richards & Co.*, L.R. [1892] 2 Q.B. 141; 66 L.T. 584; 40 W.R. 617.
- (ii.) **C. A.**—*Demurrage—Charter-party—“Despatch as Customary”—Strike.*—See Vol. 17, p. 65, iv. *Held*, that as the charter-party fixed no time for the unloading, the charterers had a reasonable time under the actual circumstances existing at the dock for unloading, and that they were not liable to the shipowners for the delay caused by the strike.—*Castlegate Steamship Co. v. Dempsey*, 40 W.R. 533.
- (iii.) **C. A.**—*Collision—Inevitable Accident.*—Decision of P. D. (see Vol. 17, p. 65, i.) reversed.—*The Merchant Prince*, L.R. [1892] P. 179.
- (iv.) **C. A.**—*Collision—“Not under Command”—Rules for Preventing Collision, Art. 5, sub-ss. (a), (c), (d).*—Decision of P. D. (see Vol. 17, p. 27, iv.) affirmed.—*The P. Caland*, L.R. [1892] P. 191; 61 L.J. P. 54.
- (v.) **P. D.**—*Collision—Thames Rules, r. 20—Anchor Stock awash.*—A vessel navigating the Thames, with her anchor hanging perpendicularly from the hawse, must carry it at least as low as stock awash, but may carry it as much lower as is thought proper.—*The J. R. Hinde*, L.R. [1892] P. 231.
- (vi.) **P. D.**—*Compulsory Pilotage—Draught of Water—Merchant Shipping Act, 1854, ss 2, 388—Order in Council, May 1, 1855, Regulation 4.*—The defendants in an action of collision pleaded that the collision took place solely through the negligence of the pilot, whose employment was compulsory. The pilot was not licensed to take charge of vessels drawing more than fourteen feet of water, and the defendants’ vessel exceeded that draught; but, when the pilot went on board, there was no pilot obtainable who was licensed to conduct ships drawing more than fourteen feet. *Held*, that the pilot was qualified *pro hac vice*, and that the plea of compulsory pilotage was made out. The action was dismissed, but without costs.—*The Carl XV.*, L.R. [1892] P. 132; 61 L.J. P. 61; 40 W.R. 576.
- (vii.) **H. L.**—*Negligence of Harbour Master—Contributory Negligence of those on Board.*—When a vessel is within the jurisdiction of a harbour master empowered by law to give compulsory orders, and he is giving his orders as to the place of anchorage or otherwise, those on board are bound to follow his orders, unless the danger of doing so is obvious to them, although they may believe that the harbour master is making a mistake. A vessel while coming into harbour under the orders of the harbour master, and in consequence of obeying his orders, grounded on

a bank, of which the master of the vessel was ignorant, though it was known to two men on board. *Held*, that the harbour master was alone to blame, that there was no contributory negligence on the part of the master of the vessel, and that the failure of the men on board, who were aware of the bank, to inform the master of the vessel of the danger, did not excuse the harbour master.—*Reney v. Magistrates of Kirkcudbright*, L.R. [1892] A.C. 264.

- (i.) **C. A.**—*County Court—Jurisdiction—Damage to Ship—Collision with Dock wall—Costs—Admiralty Court Act, 1840, s. 6—County Courts Admiralty Jurisdiction Act, 1868, s. 3—County Court Admiralty Jurisdiction Amendment Act, 1869, s. 4.*—The owner of a ship brought an action *in personam* in the Admiralty Division against a dock company, for damage done to his ship by collision with the wall of the defendants' dock, the collision having been caused by the negligence of the defendants' servants. The plaintiff recovered £220. The President refused to allow him costs on the ground that the action might have been brought in a county court having admiralty jurisdiction. *Held*, that the action was not within the jurisdiction of the Court of Admiralty, and could not therefore have been brought as an admiralty case in the county court; but that the President had jurisdiction to try the case as a common law case.—*Turner v. Mersey Docks and Harbour Board*, 40 W.R. 535.
- (ii.) **Q. B. D.**—*Detention for Overloading—Foreign Ship—Jurisdiction—Merchant Shipping Act, 1876, ss. 13, 34, 37.*—A foreign ship may be detained on the ground of being overloaded, and her master will be liable if he proceeds to sea in spite of such detention, although the provisions of the Merchant Shipping Acts have not been applied by Order in Council to the ships of the State to which such ship belongs.—*Chalmers v. Scopienich*, L.R. [1892] 1 Q.B. 735; 61 L.J. M.C. 117; 66 L.T. 348; 40 W.R. 477.
- (iii.) **P. D.**—*Limitation of Liability—Gross Tonnage—Double Bottom—Merchant Shipping Act, 1854, s. 21, sub-s. 2—Merchant Shipping (Tonnage) Act, 1889, s. 5.*—If a ship has a double bottom for water ballast, the space between the inner and outer plating may be excluded in computing the gross tonnage in an action for limitation of liability.—*The Zanzibar*, L.R. [1892] P. 233.
- (iv.) **P. D.**—*Salvage—Attempt to Tow—Derelict.*—A steamer agreed to tow a disabled ship into port for a fixed sum. The weather becoming worse the tug declined to be bound by the contract, but agreed to endeavour to tow the ship in for a sum to be fixed afterwards. The tug saved the ship from an immediate risk of going ashore, but through deficiency of coal had to leave her in a worse position than when picked up, after which a second set of salvors took her in. *Held*, that the steamer was not entitled to salvage, having conferred no actual benefit, but was entitled to some payment for work done under the agreement to endeavour to tow. The second set of salvors consisted of two steamers, on board of which the crew of the salvaged ship went. *Held*, that the salvaged ship could not be treated as a derelict for the purpose of fixing the amount of salvage.—*The Lepanto*, L.R. [1892] P. 122; 66 L.T. 623.
- (v.) **Q. B. D.**—*Seaman—Wages—Agreement—Discharge within One Month—Compensation—Merchant Shipping Act, 1854, s. 167.*—A seaman was engaged by agreement in the prescribed form to serve for a voyage from S. to B., and back to a port of discharge in the United Kingdom. The term was not to exceed six months, and the wages were stated at a monthly rate. The ship went to B. and returned in twenty-three

days, and the seaman was duly discharged. *Held*, that he was not entitled to any compensation for discharge within one month.—*Tindle v. Davison*, 61 L.J. M.C. 107; 66 L.T. 372.

See County Court, p. 122, vi.

Slander:—

- (i.) **C. A.—Office—Unfitness for—Misconduct in—Office not of Profit—Special Damage.**—Where a slanderous statement is made concerning a person holding an office, which is one of credit or honour, but not of profit, and the statement imputes unfitness for the office, but not misconduct in it, no action of slander will lie in the absence of proof of special damage, unless the misconduct imputed is such as would render the plaintiff liable to removal from his office. So *held*, in an action for slander for statements imputing that the plaintiff, who had been elected a town councillor, but had not qualified himself to act as such by subscribing the necessary declaration, was habitually drunk and unfit to be a town councillor.—*Alexander v. Jenkins*, L.R. [1892] 1 Q.B. 797; 66 L.T. 391; 40 W.R. 546.
- (ii.) **C. A.—Special Damage—General Loss of Custom.**—An action for damage done to the plaintiff's business by the malicious publication of an untrue statement may be supported by evidence of general loss of custom, if the circumstances of the publication were such that a general loss of custom would be the natural and direct result thereof.—*Ratcliffe v. Evans*, 40 W.R. 578.

Solicitor:—

- (iii.) **C. A.—Action Against for Improper Advice and Fraudulent Conduct—Frivolous and Vexatious—R.S.C., 1883, O. xxv., r. 4.**—The plaintiff alleged that, being in temporary want of money, he instructed the defendants, his solicitors, to call a meeting of his creditors and ask for time: that they advised him to file a petition in bankruptcy; that they sent to his creditors an unauthorised circular, stating untruly that he was obliged to suspend payment; that they attended the meeting by a clerk, who stated that the plaintiff's estate would not pay more than 2s. in the pound; that that statement was untrue to their knowledge, or was made recklessly; that he instructed them to submit a scheme to avoid a bankruptcy, but that they advised him not to do so; that they prepared a statement of his affairs, and persuaded him to swear that he was hopelessly insolvent, and that in that statement they intentionally or negligently and recklessly under-estimated assets and over-estimated liabilities, being aware that he was able to pay his debts in full, and that in doing those acts they knew that they were acting contrary to his interests and with a view of their own benefit, they, or one of them, having a large interest as his mortgagees or mortgagees. *Held*, that the statement of claim and the plaintiff's affidavits showed no cause of action, and that the proceedings ought to be stayed as being frivolous and vexatious. *Held*, also, that if the plaintiff had any cause of action, it had passed to his trustee in bankruptcy.—*Kellaway v. Bury*, 66 L.T. 599.
- (iv.) **C. A.—Articled Clerk—Bond by Surety—Penalty in Case of Clerk practising in Competition with Solicitor—Misrepresentation—Delay.**—A., the brother-in-law of the plaintiff, was bound as articled clerk to the defendant, who was the plaintiff's solicitor. The arrangement was made at the plaintiff's request. The articles contained no restrictions on A.'s right to practise when admitted. The plaintiff, however, executed a bond binding himself to pay the defendant £1,000 if A.

should when admitted practise within certain limits. The plaintiff claimed to have the bond cancelled as being obtained by misrepresentation, and as being unnecessary for the defendant's protection. *Held*, that there was no misrepresentation, that the plaintiff had secured the consideration for the bond, namely, the articulated clerkship for A., and further that as he had delayed for five years in taking proceedings to set the bond aside, he could not now obtain relief. *Seem*, that the plaintiff would have a remedy against A. in the event of his being called on to pay the penalty under the bond by reason of A. acting contrary to its provisions.—*Richards v. Whitham*, 66 L.T. 695.

- (i.) **Ch. D.**—*Charging Order—Assignment of Costs—Solicitors Act, 1860, s. 28.*—The assignee of costs payable by a client to a solicitor in an action is entitled to an order charging the amount of the costs assigned to him on chattels recovered in the action.—*Briscoe v. Briscoe*, 40 W.R. 621.
- (ii.) **Ch. D.**—*Lien—Change of Solicitors—Priority.*—A person employed three successive solicitors to prosecute a claim, in which he was ultimately successful. The solicitors employed firstly and secondly obtained charging orders, that of the first solicitor being expressed to be without prejudice to the question of priority, and that of the second being subject to the claim of the third solicitor. *Held*, that the third solicitor must be paid first, the second next, and the first last.—*Knight v. Gardner*, 61 L.J. Ch. 399; 66 L.T. 646; 40 W.R. 460.
- (iii.) **Ch. D.**—*Costs—Taxation—Retention of Costs before Delivery of Bill—Solicitors Act, 6 & 7 Vict., c. 73, s. 41.*—A firm of solicitors had a running account with a client, in which they credited him with moneys received on his account, and debited him with costs for their services, such costs being retained by them out of moneys in their hands. The accounts were settled and approved by the client from time to time, but no bills of costs were delivered. Four years after the last settlement of accounts, the client brought an action for an account, and the solicitors thereupon delivered their bills of costs. The plaintiff abandoned his claim for an account, but claimed taxation of the bills of costs. *Held*, that under the circumstances there had been a payment of the bills; and that, as there was no fraud or pressure on the plaintiff, and nothing to show that the bills contained gross overcharges, there was no case made out for taxation.—*Hitchcock v. Stretton*, 66 L.T. 707; 40 W.R. 555.
- (iv.) **Q. B. D.**—*Costs—Action to Recover—Signed Bill not Duly Delivered—Defence to whom Available—Solicitors Act, 1843, ss. 37, 38.*—The defence in an action by a solicitor to recover his bill of costs that there was no signed bill of costs delivered one month before action brought, is available only to the actual client, and not to another person who is sued under an agreement to pay the costs. Such person can have the bill of costs taxed under section 38 of the Act.—*Greening v. Reeder*, 40 W.R. 623.
- (v.) **Q. B. D.**—*Taxation—Oral Agreement to Pay Lump Sum—Retainer—Payment.*—A solicitor was employed to transact certain business, partly contentious and partly non-contentious, by a client who deposited a sum of money in his hands to secure the payment of any costs. After the costs had been incurred, but before delivery of any bill, the solicitor and client settled by oral agreement the amount of costs at a lump sum, which was retained by the solicitor out of the deposit. *Held*, that the retainer did not amount to payment, so that the client was entitled to have a bill delivered for taxation.—*E. p. Clough; in re West, King, and Adams*, L.R. [1892] 2 Q.B. 102.

- (i.) **Ch. D.**—*London Agent*.—The relation between London agent and country solicitor is one of solicitor and client.—*Reid v. Burrows*, 40 W.R. 620.

Trade Mark :—

- (ii.) **Ch. D.**—*Alteration of Register—Substantial Part of Mark—Word "Patent"*—*Patents, &c., Act, 1883, ss. 92, 105—Merchandise Marks Act, 1887, ss. 2, 3, sub-s. 1 (e)*.—The Court has power to give leave to add to, or alter a trade mark registered as an old mark. An old mark must be registered, and must stand upon the register, in all terms as it was used before the year 1875. The word "Patent" being an important part of a trade mark for advertising and trade purposes, is a substantial part of a trade mark, and ought not to be struck out.—*In re Adams' Trade Mark*, 66 L.T. 610.
- (iii.) **Ch. D.**—*Disclaimer—Part of Name of Company Registering—Patents, &c., Act, 1883, ss. 64, 74—Patents, &c., Act, 1888, s. 10*.—The Smokeless Powder Company registered a trade mark, part of which consisted of the name of the company. On an application for a disclaimer of the words "Smokeless Powder," held, that no disclaimer was required, the words not being "distinctive words," and not being an addition to but part of the trade mark, and not being "calculated to deceive."—*In re Smokeless Powder Co.'s Trade Mark*, L.R. [1892] 1 Ch. 590; 61 L.J. Ch. 391; 66 L.T. 407; 40 W.R. 507.
- (iv.) **Ch. D.**—*Fancy Words—Brand—Patents, &c., Act, 1883, s. 64 (1) (c)—Patents, &c., Act, 1888, s. 64 (1), sub-s. (e)*.—The words "John Bull Brand" were registered by brewers under the Act of 1883 as a trade mark for beer. The evidence was that the mark denoted beer brewed by them and nobody else. On a motion to expunge, held, that the words were not "fancy words not in common use"; secondly, that the trade mark could not be supported as being a "brand"; and thirdly, that the case must be decided under the Act of 1883 alone; but, *semble*, that the words were not "words having no reference to the character or quality of the goods" within the Act of 1888.—*In re Paine & Co.'s Trade Mark*, 61 L.J. Ch. 365; 66 L.T. 642.
- (v.) **Ch. D.**—*"Special Distinctive Words"—Name of Individual or Firm—Trade Marks Registration Act, 1875, s. 10—Patents, &c., Act, 1883, s. 64, sub-s. 3*.—Where the name of an individual or firm, printed in ordinary type, has been used as a trade mark before the 13th August, 1875, and it points to the goods as being those of a particular manufacturer, it may properly be registered as a "special distinctive word or combination of words."—*In re Hopkinson's Trade Mark*, L.R. [1892] 2 Ch. 116; 61 L.J. Ch. 387; 66 L.T. 487.
- (vi.) **Ch. D.**—*Letters—Disclaimer—Get-up—Patents, &c., Acts, 1883, s. 64, sub-s. 2, s. 74, sub-s. 2, s. 77; 1888, ss. 10, 16*.—The plaintiff, W. R., a corset maker, stamped his goods with the letters "W. R.," by which and other means his corsets were known as "W. R." corsets. The defendants, corset makers, trading as W. R. & Co., stamped their corsets with the letters "W. R." in the same manner as the plaintiff, but in other respects the get-up was different. The plaintiff had disclaimed the exclusive right to use the letters "W. R." in registering his trade-marks. Held, that no relief could be granted against the defendants' use of those letters.—*Rosenthal v. Reynolds*, 40 W.R. 521.
- (vii.) **Ch. D.**—*Registration—Practice—Opposition—Fresh Evidence—Amendment of Notice—Appeal—Patents, &c., Act, 1883, s. 69, sub-ss. 1, 4; s. 90, sub-s. 1—Trade Marks Rules, 1890, rr. 26, 31, 54, 55—R.S.C., 1883, O. xxviii., r. 12*.—G. & Co. gave notice of opposition to the registration

of a trade mark by R. & Co. At the hearing before the registrar G. & Co. desired to adduce fresh evidence not included in their notice. The registrar refused to hear the fresh evidence, and G. & Co. did not ask leave to amend their notice. They afterwards, by way of appeal to the Court, moved for leave to amend their notice of opposition. *Held*, that the Court could only hear and determine the appeal, and could not give leave to amend. Motion refused without prejudice to any application which might be made to the registrar with reference to amendment.—*In re Robertson, Sanderson & Co.'s Application, and Gillon & Co.'s Opposition*, L.R. [1892] 2 Ch. 245; 66 L.T. 673; 40 W.R. 569.

Trustee:—

- (i.) **H. L.**—*Investment—Power to Vary—Trust Investment Act, 1889, ss. 3, 6*—Decision of C. A. (*see* Vol. 16, p. 103, i.) affirmed.—*Hume v. Lopes*, L.R. [1892] A.C. 112; 66 L.T. 425; 40 W.R. 593.
- (ii.) **Q. B. D.**—*Money Received under Mistake and Paid to Cestui-que-trust—Action Against Trustee.*—The defendant lent trust money to the plaintiff on mortgage. The mortgage deed provided for interest at 5 per cent., to be reduced to 4 per cent. on punctual payment. All the payments, except the first, were made punctually, but owing to the plaintiff's ignorance of the proviso for the reduction of interest, they were made at the rate of 5 per cent. *Held*, in an action against the defendant to recover the amount overpaid, that the only contract was between the plaintiff and the defendant, and that the action was rightly brought against the defendant, and not against the *cestui-que-trust*.—*King v. Stewart*, 66 L.T. 339.
- (iii.) **Ch. D.**—*Trustee Act, 1888, s. 6—Construction of—Breach of Trust—Impounding Interest of Beneficiary.*—The words "in writing" in the section above-named apply to consent only, and not to instigation or request. A trustee, at the verbal request of a beneficiary, advanced to her and her husband a sum of cash, out of a fund to the income of which she was entitled for life for her separate use without power of anticipation. The advance was made by the trustee for the benefit of the beneficiary, and in ignorance of the meaning of "without power of anticipation," and under an agreement that the advance should be made good out of the income of the fund. *Held*, that the Court ought, in its discretion, to direct that the trustee should be indemnified out of the income of the fund payable to the beneficiary.—*Griffith v. Hughes*, 40 W.R. 524.
- (iv.) **Ch. D.**—*Trustee de son Tort—Control of Trust Moneys.*—A testator left his property on trust for his widow and children, but gave no directions as to carrying on his business. The widow, who was executrix, with the advice of two friends, carried on the business. The friends assisted her in the business, knowing that it was a breach of trust. By arrangement with the bankers no cheques were honoured out of the business account unless they were initialed by the two friends. The business was carried on at a loss, and the estate diminished. *Held*, that the two friends could not be made liable on the ground of being trustees *de son tort*. They supplied the widow with goods in the ordinary course of business, and were paid with cheques on the business account. *Held*, that they were not trustees of the moneys so received. One of them became a trustee of a deed of arrangement under which all the effects used in the business were sold and the proceeds distributed among the creditors, of whom he was one. *Held*, that he did not thereby incur any liability to the children of the testator as a constructive trustee.—*Barney v. Barney*, L.R. [1892] 2 Ch. 265; 40 W.R. 637.

- (i.) **Ch. D.**—*Vesting Order—Death of Sole Trustee—Personal Representative out of Jurisdiction.*—Where the legal personal representative of a deceased sole trustee is out of the jurisdiction, and refuses to transfer the trust securities to new trustees, a vesting order will be made.—*In re Trubee's Trusts*, 40 W.R. 552.

See Debtor and Creditor, p. 124, ii.

Vendor and Purchaser:—

- (ii.) **C. A.**—*Contract—Offer of Refusal—Acceptance by Post—Withdrawal.*—On July 7th, in Liverpool, F. handed to H., who lived at Birkenhead, a letter giving him "the refusal" of certain property for fourteen days at £750. Next afternoon H. posted a letter, which was received by F. the same evening, accepting the offer. In the meantime F. having sold the property to a third person, posted a letter revoking the offer. This letter was posted before the posting of H.'s letter, and was received by H. after such posting, and before the receipt by F. of H.'s letter. *Held*, that it was a proper inference that H. might accept by post, that there was therefore a binding contract on the posting of the letter of acceptance, and that the attempted revocation of the offer was ineffectual.—*Henthorn v. Fraser*, L.R. [1892] 2 Ch. 27; 61 L.J. Ch. 373; 66 L.T. 438; 40 W.R. 433.
- (iii.) **Ch. D.**—*Parcels—Overhanging Buildings.*—A portion of premises as occupied overhung adjoining premises. The owner in fee of both premises demised them as occupied to separate persons. He then conveyed the overhung premises by reference to a ground-floor plan, subject to the lease of those premises, but not expressly subject to the lease of the overhanging premises. *Held*, that the overhanging part of the adjoining premises passed by the conveyance. The ownership of a building partly overhanging other premises does not give the owner a right to raise the overhanging part of his building.—*Laybourn v. Gridley*, L.R. [1892] 2 Ch. 53; 61 L.J. Ch. 352; 40 W.R. 474.
- (iv.) **Q. B. D.**—*Water-Rate—Arrears due before Sale—Liability of Purchaser*—50 & 51 Vict., c. 21, s. 4.—Where the owner and not the occupier of a house is liable by law or by agreement with the water company to pay the water-rate in respect of the house, the purchaser of the freehold of the house is liable to a personal action at the suit of the company to recover the arrears of the water-rate, which accrued due before the purchase.—*East London Waterworks Co. v. Kellerman*, L.R. [1892] 2 Q.B. 72.

See Settled Land, p. 145, iii.

Will:—

- (v.) **P. D.**—*Ambiguity—Parol Evidence—Costs.*—The Court, being of opinion that there was no latent ambiguity in the words of a will, refused to admit evidence of the declarations of the testatrix to explain such words. The testatrix recited in her last will that she had settled one undivided moiety of the residue of a certain fund on her daughter. She had in fact settled by deed on her daughter a sum of money out of that fund. *Held*, that a former will, by which she bequeathed one moiety of the residue of that fund on trusts in favour of her daughter, ought not to be incorporated. An order was made for the costs of all parties to be paid out of the estate, the litigation having been caused by the testatrix herself.—*Paton v. Ormerod*, 66 L.T. 881.
- (vi.) **Ch. D.**—*Construction—Foreign Original—Probate of Translation—Right to Look at Copy of Original.*—An English translation of a French will had been admitted to probate. It was alleged that the translation

was incorrect. *Held*, that the Court could look at a certified copy of the original.—*In re Cliff's Trusts*, L.R. [1892] 2 Ch. 229; 61 L.J. Ch. 397; 66 L.T. 483; 40 W.R. 489.

- (i.) **Ch. D.—Construction—Illegitimate Children.**—A testator by will, made in 1889, bequeathed legacies to "each of the children" of his brother, excepting two (one illegitimate and the other legitimate), and bequeathed a fund upon trust, after the death of his said brother, for "the present wife of my said brother, if she shall become his widow during her life," and after her death upon trust for "all the children of my said brother" excepting the same two. The testator's brother, who predeceased him, had two children by his wife who died in 1875. In 1876 he went through a fictitious ceremony of marriage with B, who passed as his wife, and by whom he had seven children, one born since the date of the will. *Held*, that the illegitimate children (except the one born since the date of the will) were entitled together with the legitimate child to the benefits given to the "children," and that B. was entitled to the income of the fund for life.—*Danily v. Platt*, 40 W.R. 475.
- (ii.) **H. L.—Construction—Implied Gift.**—Decision of C. A. (*see* Vol. 16, p. 28, iv.) affirmed.—*Scale v. Rawlins*, 66 L.T. 542.
- (iii.) **Ch. D.—Construction—Joint Tenancy—Gift to Three Persons and their Respective Heirs.**—Gift of real and personal estate to A. for life, and subject thereto in trust for J., T., and G., and for their respective heirs, executors, administrators, and assigns. J. died before the testator, G. died afterwards, an infant and unmarried. *Held*, that there was a joint tenancy for the lives of J., T., and G., with several remainders to them in common. Therefore T. took the whole for life, with remainder as to two-thirds to J. and G. in common. The remainder in the one-third given to J. was undisposed of by the will.—*In re Atkinson*, 66 L.T. 717.
- (iv.) **Ch. D.—Construction—Nephew—Class—Husband and Wife—Shares.**—Testator gave to S. and his wife, whom he called his nephew and niece, memorial rings, and he gave legacies to each "of my nephews and nieces," naming them. He gave his residuary estate in trust for all his nephews and nieces living at his death, to be equally divided between them, "including my nephews and nieces to whom I have given legacies as aforesaid." S. and three of the others named were nephews and nieces of the testator's wife. The wife of S. was not a niece of the testator or his wife. *Held*, that the wife of S., and the nephews and nieces of the testator's wife, took under the residuary gift. *Held*, also, that S. and his wife each took a share.—*Smith v. Gue*, 40 W.R. 553.
- (v.) **P. D.—Probate—Codicil—Mistake in Date of Reference.**—A testatrix executed a will in 1887, and another in 1889, revoking the same. She afterwards executed a codicil, which was described by mistake as a codicil to the will of 1887. *Held*, that probate might be granted of the will of 1889 and the codicil, with the reference to the will of 1887 omitted.—*In the goods of Gordon*, L.R. [1892] P. 228.
- (vi.) **P. D.—Probate—Executor according to the Tenor—Security.**—Testatrix desired two named persons to "carry out these my wishes," and for their trouble they were each to take a legacy of nineteen guineas. "After these and all other claims" had been met, they were to deal with the residue in the manner set forth in the will. *Held*, that they were executors according to the tenor, and that it lay upon the person asking that they should give security to show why security should be given.—*In the goods of Allam*, 66 L.T. 382.

- (i.) **P. D.**—*Probate—Executor according to the Tenor.*—A testatrix appointed A. and B. "trustees" of her will, and expressed her wish that they should pay her funeral expenses and debts. *Held*, that A. and B. were trustees according to the tenor.—*In the goods of Wilkinson*, L.R. [1892] P. 227.
- (ii.) **P. D.**—*Probate—Identical Wills of Husband and Wife—Presumption as to Survivorship.*—A husband and wife executed identical wills, each appointing the other sole executor and universal legatee, and substituting executors in case of the other dying first. They started on a voyage on the same ship, which was supposed to have been lost with all hands. There was no evidence that either of them survived the other. *Held*, that a grant of administration with the will annexed should be made to the next-of-kin of each.—*In the goods of Alston*, L.R. [1892] P. 142; 66 L.T. 591.
- (iii.) **P. D.**—*Probate—Revocation—Revival.*—The testator left a will and four codicils. The third codicil revoked the first and second codicils. The fourth codicil confirmed the "will and former codicils." *Held*, that probate should be granted of the will, and the third and fourth codicils.—*In the goods of Carritt*, 66 L.T. 379.
- See Infant*, p. 128, iii.

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